No. 398. 125 M.

Brief of Scott for D. C.

Filed Jan. 18, 1896.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. ~~193~~. 398.

A. A. McCULLOUGH, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

In error to the Supreme Court of Appeals of the State of Virginia.

Brief of R. TAYLOR SCOTT, Attorney-General of Virginia, for the Defendant.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 733.

A. A. McCULLOUGH, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

In error to the Supreme Court of Appeals of the State of Virginia.

Brief of R. TAYLOR SCOTT, Attorney-General of Virginia, for the Defendant.

THE CASE STATED.

The contention presented by the record brings again before your honors in one of its many and varied forms the controversy long waged between the Commonwealth of Virginia and her creditors over *the coupon contract* attached to the bond issue of 1871 and 1879. *The last* decision upon this subject will be found in the elaborate and able opinion of *Mr. Justice Bradley* in "*McGahey* vs. *Virginia*," reported in 135 U. S., 664.

The plaintiff in error as provided by statute presented to the trial court [the Circuit Court of Norfolk city, in Virginia], certain coupons alleged to have been cut from genuine bonds of the Commonwealth of Virginia for identification and verification and obtained judgment against the State.

Appeal was taken to the Supreme Court of Appeals of Virginia and the *nine* assignments of error will be found on pages 4 to 8, and the appellant's petition on page 9 of the record; the trial court was reversed March 15th, and this writ of error allowed *June 13, 1894*.

I find in the appellant's petition but *one* assignment of error, viz.:

That by the decision to be reviewed in this high court—THE HIGHEST IN THE UNITED STATES——*art. 1, sec. 10, sub-section 1, of the Federal Constitution, which forbids the States to pass any law impairing the obligation of contracts*, is violated, abrogated, and annulled.

NO FEDERAL QUESTION.

I contend for the defendant in error that no *Federal* question can be found in this record.

The *pivot* on which the case turned in the Supreme Court of Appeals of Virginia was the power of the Legislature, under the Constitution of that State, to make the contract embodied in *the coupon* attached to the bonds issued under the act approved *Mar. 30, 1871*, and that approved *Mar. 28, 1879*, the former known as "THE FUNDING BILL," and the latter as "THE MCCULLOUGH BILL," and the court held that the Legislature had not the power to make such contract. Therefore, the act which imparted to the coupon its tax-paying power was *ultra vires* null and void.

The meaning and scope of *the coupon contract* has been twice adjudged, but in different ways, by the court aforesaid—viz., that given by "Antoni vs. Wright," 22 G., 833, and that by "Commonwealth vs. McCullough," 90 Va., 597.

I contend that in passing upon the error assigned by its unvarying rule, this court must follow and be governed by *the last decision*.

CHIEF JUSTICE MARSHALL refused to admit, and did not follow the distinction taken in "*Hamilton* vs. *Dudley*," 2 Pets., 524. He said:

"The judicial department of every government is the rightful expositor of its laws and emphatically of its supreme law."

And in *Elmendorf* vs. *Taylor*, 10 Wheat., 549: "The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."

Mr. Justice McLean, in the remarkable case, GREEN vs. MCNEAL [6 Pets., 298], in which *this* court reversed its own construction of Tennessee's statute of limitation and adopted that of the Tennessee court, formulates this principle as follows: "The decisions of the highest judicial tribunals of a State should be considered as final by this court, not because the State tribunal in such case has any power to bind the court, but because in the language of the court in *Shelby et als.* vs. *Guy*, 11 Wheat., 361, 'a fixed and received construction by a State in its own court makes a part of the statute law,' and in the words of CHIEF JUSTICE TANEY, in Martin vs. Waddill [16 Pets., 410], "the sanction of the judicial authority of the State is given to it. * * * This decision made upon such a question with great deliberation and research ought, in our judgment, *to be conclusive*."

The FEDERAL QUESTION presented to this court in "LLOYD vs. MATTHEWS," 155 U. S., 222, was whether or not Ohio's statute concerning the transfer of stock had been given full faith and credit by the Kentucky Court of Appeals in deciding the questions before it, and CHIEF JUSTICE FULLER said: "If every time the courts of a state puts a construction upon the statutes of another State, this court may be required to determine whether that construction was or was not correct, upon the ground that if it was concluded that the construction was incorrect, it would follow that the State courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

The argument of the CHIEF JUSTICE applies A FORTIORI to

this case. This court is not called upon in the exercise of appellate jurisdiction to instruct State courts of last resort how to construe and interpret their own laws and constitution.

The construction of the CONSTITUTION OF VIRGINIA and the powers of her General Assembly under it to enact the laws which authorized the issue of the bonds and the binding force of the coupon contract attached to said bonds is not A FEDERAL question, therefore this writ of error *should be dismissed*.

THE COUPON CONTRACT—ULTRA VIRES AND VOID—I contend that THE COUPON CONTRACT is not the contract of and does not bind the State of Virginia, because her constitution dedicates "the school tax" to her public schools, "fines" to the literary fund, and her statute laws require the liquor license and *all* taxes to be paid in gold and silver coin, United States treasury notes, or national bank notes, and the statutes as to liquor license, school tax, and fines have been held *valid* by this court.

Vashon *vs.* Greenhow and Hucless *vs.* Childrey, 135 U. S., 662-671.

Constitution of Virginia, Article viii., sections 7 and 8.

Code of Virginia, 1887, section 535.

TAXES to be levied by legislatures to be assembled are not assets IN ESSE, therefore cannot be appropriated or applied.

The Legislature in session cannot impair, injure, or destroy the constitutional and sovereign powers of its successors.

The theory and practice of our government—State and Federal—*this*: The whole subject of taxation, raising and collecting public revenue, and its appropriation is under the control of the Legislature in session, and a sovereign

power which cannot be surrendered or parted with by contract.

The term "*contract*," as used in the Federal Constitution, does not embrace or include, nor does it apply to rights and interests growing out of measures of public policy, and though rights and interests be acquired under and by virtue of such laws, they are not violated *in the constitutional sense* by enacting subsequent laws, even though thereby they are destroyed.

In "*Ohio Ins. and Trust Co* vs. *DeBolt*" [10 How., 416], CHIEF JUSTICE TANEY said: "They [*the Legislature*] cannot, therefore, by contract deprive a future Legislature of the power of imposing any tax it may deem necessary for the public service *or of exercising any other act of sovereignty confided to one legislative body*, unless, indeed, the power to make such contracts is conferred upon them by the Constitution of the state."

The reason for this is plain, "REVENUE IS THE STATE."

Appropriations are made and set apart in advance of the receipt of taxes into the treasury, such as the support of the civil and military service, expenditures necessary for the institutions—literary and eleemosynary—and if the funds be diverted or applied to objects for which they were not destined, the public service would be paralyzed, and "confusion worse confounded" follow.

States are not like the citizen. Their [the States'] mission is to govern and direct the ramified and ever changing affairs of men; their obligations bind to the past and reach forward to the future. The State's measure of duty and obligation, the greatest good to the greatest number—PRO BONO PUBLICO. As was said by JUDGE STAPLES in "Antoni vs. Wright," SUPRA: "In Virginia it has been the uniform practice for each Legislature to impose the taxes necessary for the purposes of the government during the existence of such Legislature; and this attempt—*thirty*

YEARS IN ADVANCE—to appropriate the sum of TWO MILLIONS YEARLY to a specific purpose, beyond the control of every power in the State, is believed to be without precedent in the history of this or any other State. If there be any advantage in the frequent recurrence of popular elections, it is only in the fact that the burdens annually laid upon the people are imposed by those fresh from their midst and familiar with *their* condition, wants, and circumstances. An *irrepealable* law, therefore, imposing taxes to a large amount and dedicating the revenue thus raised to any specific object—even the payment of a public debt—would seem to be contrary to the genius and spirit of our institutions.

"If some future Legislature, in an hour of madness or folly, should provide that the bonds of the State should be received in payment of all public dues, we must equally hold that such legislation constitutes a valid and binding contract. This is the necessary result of the decision just made."

Discussing "WOODRUFF vs. TRAPNALL" [10 How., 190] and "FURMAN vs. NICHOL" [8 Wall., 224], authorities relied upon by JUDGE BOULDIN, who spoke for *the majority judges*, this able, careful, experienced, and learned judge said: "I do not consider either of the cases as involving the question arising in this, and with the greatest possible respect for my brethren, I do not believe the Supreme Court of the *United States* will ever hold that one Legislature can by any form of enactment bind succeeding Legislatures and the public revenue in the manner attempted in the provisions of the funding act, and until they so decide I am not willing that this court should sanction a precedent which may prove most disastrous to all the vital interests of the State, and under authority of which, practically, liens and mortgages may be given upon the future revenues of the State by statutes assuming the form of

contracts. We have heard a good deal of violated faith and of the obligation and duty of paying the public debt. * * * They who purchased the bonds of the State were well aware of this when they made their investments. They who deliberately and in defiance of a positive enactment of the Legislature that *these coupons* will not be received in payment of public dues persist in purchasing them, are not entitled to the least favor or consideration, and should receive none from the court."

The conclusion reached by *the dissenting judge* in "*Antoni* vs. *Wright*," is now the law of Virginia, and that case overruled. JUDGE RICHARDSON, speaking for *four* of the *five* judges who heard *this* case, after a careful, analytical, and exhaustive review of *all* the cases, said:

"In view of those decisions and being entirely satisfied that the coupon feature of the act of 1871, which is distinct and separable from the main features of the act, is tainted with the vice of *illegality*, which renders the whole *coupon contract* illegal and void, we take, in view of the said Supreme Court decisions, the one additional necessary step and declare the whole coupon contract *absolutely* illegal and void.

"This leaves the bond and coupon holders to accept the terms of the recent settlement or to pursue the ordinary remedies for the collection of their principal and interest; and by either mode they will get more than in good conscience they are entitled to. For these reasons we reverse and annul the judgments, respectively, in each of the above named cases."

["COMMONWEALTH VS. MCCULLOUGH," 90 Va., 619-620.]

The principles announced in "Hamilton vs. Dudley," Elmendorf vs. Taylor, Shelby *et als.* vs. Guy, and Martin vs. Waddill rule this case, and if not dismissed for want of jurisdiction, on its merits must be *affirmed*.

"A MOOT CASE."

THE STATES OF THE UNION are independent *sovereignties* and *indestructible*.

MR. JUSTICE MATTHEWS, in EX PARTE Ayers, 123 U. S., 143, said:

"It cannot be doubted that the eleventh amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. Louisiana *vs.* New Orleans, 102 U. S., 203. That obligation, by virtue of the provision of Article I., section 10, of the Constitution of the United States, cannot be impaired by any subsequent State legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the eleventh amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion. Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity without any violation of the obligation of its contract in the constitutional sense. Beers *vs.* Arkansas, 20 How., 527; Railroad Co. *vs.* Tennessee, 101 U. S., 337. The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming

nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

The decisions of *this* court quoted by counsel for appellant were based and rest upon "Antoni vs. Wright"—"THE ILIAD" of Virginia's financial woes—their foundation destroyed the cases as to this contention are without point, weight, or authority.

Without their consent "*The States*" cannot be sued, nor can they be subjected to "process" of their own courts, their creation and creatures, nor of this court. Virginia's consent to this suit was given, but the statutes, one and all, whereby consent was given, have been repealed and this consent withdrawn, therefore the suit IS ENDED.

Chapter 318, Session Acts 1893–'94, page 381, *approved February 21, 1894*, provides:

"1. Be it enacted by the General Assembly of Virginia, that sections 406, 407, 408 of the Code of Virginia, the latter section as amended and re-enacted by an act entitled 'an act to amend and re-enact section 408 of the Code of Virginia in reference to proceedings to try genuineness of coupons,' approved February 22, 1890, and also sections 409, 410, 411, 412, 414, 415, 536, 537, 538, 540, 541, 542, and 543 of the Code of Virginia be, and the same are, hereby repealed.

"2. This act shall be in force from its passage."

It follows, therefore, that there is no court in the Commonwealth of Virginia which has jurisdiction over the subject matter of this case, or empowered by its constitution and laws to rehear or to execute the mandate of your honors, should there be reversal of the judgment complained of. You have before you a case with a body but no soul, form without substance as unreal as the fabric of a vision or a dream—"A MOOT CASE." The Supreme Court of Appeals of Virginia recently so held in "Maury vs. Commonwealth," decided *Dec. 5, 1895*, but not reported.

EX PARTE McCardle, 7 Wall., 506.

Ins. Ca. vs. Ritchie, 5 Wall., 544.

John Gut vs. Minnesota, 9 Wall., 35.

So. Ca. vs. Gaillard, 101 U. S., 433.

Hollingsworth vs. Virginia, 3 Dall., 378.

Dulin vs. Commonwealth [Va.], 20 S. E. R., 821.

IN CONCLUSION, I adopt and make the argument of my associate, HON. H. R. POLLARD, contained in his brief filed when this case was before the Supreme Court of Appeals of Virginia, part and parcel of this brief: *Ne Exeat*

ON THE MERITS—ON THE CONSTITUTIONAL QUESTION.

These cases present a serious, and to the State and her creditors as well, who have accepted in good faith the late settlement of the public debt, a momentous question, that the court is called upon to determine.

In round numbers there are matured tax-receivable coupons outstanding to the amount of one million of dollars, and of bonds with unmatured tax-receivable coupons attached to about one million three hundred thousand dollars, thus making an annually maturing charge of such coupons of about seventy-two thousand dollars from now until 1905, or, in the aggregate, of about eight hundred thousand dollars. If these liabilities were funded under the late settlement (Acts 1891-'92, p. 533) a new principal

of, say, one million six hundred thousand dollars would be created, payable at one hundred years, carrying interest at the rate of two per cent. for ten years, being an annual charge of thirty-two thousand dollars, and thereafter at three per cent., making annually forty-eight thousand dollars.

The following statement, furnished by the Second Auditor, shows at a glance how much is involved to the Commonwealth:

Consol bonds outstanding,		$1,015,400 00
Ten-forty bonds outstanding,		309,900 00
		$1,325,300 00
Annual coupons,	$73,320 00	
Fundable value of outstanding bonds,		895,625 00
Saved in principal,		$ 429,675 00
Annual interest,	17,912 50	
Annual saving if bonds are funded,		$ 55,407 50
Amount of matured coupons outstanding,		1,000,000 00
Fundable at 75 per cent. into 2 and 3 per cent. bonds,		750,000 00
Saved on coupons,		$ 250,000 00

RECAPITULATION.

Saved in principal,	$ 420,675
Annual saving in interest for eleven years of $55,407, equal to	609,477
Saved on coupons,	250,000
Total amount involved,	$1,289,152

Not only does the State gain this great direct advantage, but a favorable determination of the question once for all ends the vexatious litigation that the Commonwealth is compelled to keep up with a few creditors who remain on the outside of the settlement, and find it convenient, because profitable, to let their bonds remain unfunded, clip the coupons and force them into the treasury. While nineteen-twentieths of the creditors have accepted the terms so favorable to the State, this one-twentieth part proposes to wage a judicial warfare against the Commonwealth, as the numerous cases on the dockets of the larger cities abundantly prove.

The fact that such a large proportion of the creditors so promptly accepted the terms of the late settlement is doubtless due to their able and astute counsel seeing, after the decision of this court in *Greenhow* vs. *Vashon*, 81 Va., 350, affirmed by the Supreme Court of the United States (135 U. S. R., 716), the handwriting on the wall.

To sustain the constitutionality of the funding act of 1871, counsel and courts had necessarily combatted the contention that the eighth section of the eighth article of the State Constitution dedicated certain portion of the State revenues to the support of free schools, and it was practically admitted—at least, it was never denied—that could it be shown that the Legislature did not have the constitutional right to allow funds so set apart to be absorbed by the tender of coupons, that then the tax receivable feature of the coupon could not be sustained, as will clearly appear from the quotations I now propose to make from the various decisions of this court and the Supreme Court of the United States.

Judge Bouldin, who delivered the opinion of the court in *Antoni* vs. *Wright*, *supra*, at page 836-7, states the question at issue as follows:

> "1. Was there under the act aforesaid of March 30, 1871, a valid contract between the

> State and such of her creditors as accepted and complied with the terms of the act that interest COUPONS issued thereunder should 'be receivable at and after maturity for all taxes, debts, dues, and demands due the State.' * * *
>
> "The first and all-essential question is, was there a valid contract between the State and her bondholders?"

And at page 854 he squarely meets the question of the effect of the constitutional obligation resting on the Legislature to keep inviolate the fund dedicated to free school purposes and thus dispose of it:

> "And we are of opinion, in the absence of other objections, that the power of the Legislature to make the contract under consideration is unquestionable.
>
> "But conceding that proposition, it is argued that the contract in this case is void because it is repugnant to the eighth section of the eighth article and the third section of the tenth article of the State Constitution, dedicating certain portions of the State revenue to the support of free schools. * * *
>
> "The obligations to provide for the interest due by these COUPONS is as high as the duty of applying the capitation tax and other funds to the schools. Both duties are alike obligatory, and both may be discharged, as there is no conflict between them. It is only a failure to discharge the one that the performance of the other can be put in jeopardy, and it rests with the Legislature by faithfully and fearlessly meeting both obligations to

> preserve the plighted faith of the State and to protect her Constitution from violation."

And Judge Anderson, who delivered the opinion of the court in the same case (*Antoni* vs. *Wright*) on a rehearing, at page 874, says:

> "But it is argued that the Legislature had no power under the Constitution to authorize a contract to be made binding the State to receive the interest coupons when due in payment of taxes, etc,. upon the ground—first, that it is incompatible with other obligations imposed upon the Legislature by the Constitution of the State. And in support thereof it is said those provisions of the Constitution which set apart certain funds and a certain proportion of the tax for the public schools would be defeated by this legislation. It would seem to be a sufficient reply to say that if it were impracticable to raise a sufficient revenue for both purposes, the latter did not impose an obligation on the Legislature paramount to the obligation to provide for the payment of the interest on the public debt. That was an obligation antecedent and paramount to the Constitution itself, and could not be repudiated by the Constitution if it had so provided. But it is not repudiated nor ignored, but the obligation is clearly recognized by sections 7, 8, 19, and 20 of article 10, at least to pay Virginia's proportion. And, furthermore, this being an obligation of debt, and not eleemosynary in its character, as are the other provisions referred to, however desirable and important it may be that they should be carried out, I

> hesitate not to say this is of higher obligation. A man must be just before he can be generous.
>
> "But there need be no clashing of duties here. It is only required that the Legislature should levy a tax sufficient for both objects—a duty imposed on it by the Constitution. It has not been the practice to set apart in the public treasury the identical money received for the public schools; nor is it required by the Constitution or act of Assembly. And the Legislature has discharged its constitutional obligation when it has set apart the required amount for that purpose."

The logical deduction from the reasoning of the court in *Antoni* vs. *Wright* found its practical outcome in the case of *Clarke* vs. *Tyler*, sergeant, 30 Grat., 134, in which it was held that *fines*, though expressly dedicated by the Constitution to free school purposes, might be paid in *coupons*, and Judge Christian, who delivered the opinion of the court, boldly asserted that the contract on the face of the *coupon* was broad enough to embrace *fines* as well as other dues. He said:

> "The Legislature has used words which by their explicit, comprehensible, and unmistakable meaning embrace fines as well as taxes and debts. If, after using the words 'dues and demands,' they had intended to EXCLUDE FINES, how easy it would have been to have added the words 'except fines' after the words 'dues and demands.' But having used these broad and comprehensive terms, which by their common and explicit meaning embrace fines, and having used no words of exception, it follows upon every rule

> of construction that fines are embraced in the terms 'dues and demands.'"

He then proceeded to reiterate the argument made in *Antoni* vs. *Wright*, that the Legislature was under greater legal and moral obligation to keep this coupon contract than to keep inviolate the free school fund. He said:

> "No State, in order to educate its citizens, ought to withhold from its just creditors that which has been pledged by its honor and plighted faith to the payment of its just debts."

And Judge Anderson in the same case, in an elaborate opinion concurring in the opinion of the court, at page 164, said:

> "In our complex form of government, as we have seen, the courts are bound to have respect to and take cognizance of, the Federal as well as the State Constitution. In fact, to regard the former as the supreme law, which invalidates—renders null and void—any law of the State which impairs the obligation of contracts. Now, it is claimed in argument that the State Constitution imposes an equal, if not higher, obligation on the State to carry out the provisions for the schools. In my opinion it cannot be so regarded, neither in morals, nor in law. * * * And the reason is because the obligation in the former case is not a CONTRACT within the meaning of the 10th section of article 1 of the Federal Constitution. Consequently, if the revenues which have been set apart for the schools are necessary in fulfilment of the contracts of the Commonwealth, to be applied to the payment

> of the interest on the public debt, so to apply them is not prohibited by the Constitution of the United States; whilst to set apart by the State Constitution, or by an act of the Legislature, a portion of the revenues of the State for schools, or as a literary fund, which are NECESSARY to enable the Commonwealth to fulfil her obligations of contract, and without which it would be impracticable for her to fulfil them, would be a plain violation of the Federal Constitution, because it would be a law of the State which impairs the obligation of contract."

Judge Staples, who delivered a dissenting opinion in this same case, at pages 148–49, thus states the drift and effect of the decisions of the court on this all-important question:

> "It is very true that fines have heretofore been paid into the treasury indiscriminately, with other public dues, and so long as the whole was paid in money no injustice or inconvenience could arise. But now the question is presented in an entirely different aspect. For if the Legislature shall pass a law, as it long ago ought to have done, carrying out this provision of the Constitution, and setting apart the fines for school purposes, under the present ruling of the court, MUST BE HELD UNCONSTITUTIONAL, BECAUSE THE FUNDING BILL AUTHORIZES THE PAYMENT OF STATE DUES IN COUPONS, AND THUS IT IS THAT AN UNCONSTITUTIONAL CONTRACT IS MADE PARAMOUNT TO THE CONSTITUTION."

The small caps are mine, and they are intended to emphasize the opinion of this able and fearless judge as to the logical and inevitable effect of the decisions previous to *Greenhow, Treasurer*, vs. *Vashon*.

Again, this learned judge (Staples) says, at page 147:

> "I agree that the funding act is broad enough to include fines imposed for the violation of penal laws, and upon that ground, I thought, and still think, violates the seventh section of the eighth article of the Constitution of Virginia."

This same judge, in probably the ablest opinion ever delivered by him, or by any Virginian jurist, that formed the basis of one of the greatest political tergiversations that ever swept over the Commonwealth, thus speaks:

> "My objection is not based upon any idea that a specific sum is set apart in the public treasury in particular coin and notes for common schools which may not be touched; but that the Legislature cannot constitutionally provide that the school tax shall be paid in any other medium than money or its equivalent, and for the obvious reason that a fund is to be raised from the particular source designated to be applied to the establishment of public free schools for the benefit of all the people of the State. These objects are effectually defeated by the funding act."

And with words that burn he concludes his argument:

> "These are some of my objections to the funding bill as affected by the Constitution of Virginia. It can hardly be necessary to adduce argument or authority to show that no

> VALID CONTRACT can be founded on a law which violates the Constitution of a State. NO BINDING OBLIGATION CAN RESULT FROM SUCH A LAW. It confers no legal right on the one party and imposes no corresponding legal duty on the other."

Antoni vs. *Wright*, 22 Grat., 862–63.

As before said, neither this Court nor the Supreme Court of the United States denied the soundness of this argument, provided it could be shown that the school funds could not legitimately be intercepted by *coupons*.

As tardy as the Legislature was to respond to its constitutional duty, it at last, in 1884, inserted into the tax bill the following section:

> "113. All taxes assessed on property, real or personal, by this act and by it dedicated to the maintenance of the public free schools of the State, shall be paid and collected only in lawful money of the United States, and shall be paid into the treasury to the credit of the free school fund and shall be used for no other purpose whatever. And to this end the Auditor of Public Accounts shall have the books of the commissioners of the revenue prepared with reference to the separate assessment and collection of said school tax, and the several treasurers of the Commonwealth shall have the tax bills in their counties or corporations so made out as to specify the amount of tax due from each tax-payer to the said public free school fund, including the capitation tax and school taxes of whatever kind or nature, and to keep said capitation tax and school taxes separate and

> distinct from all other taxes or revenues so collected by him and forward the same, thus separate and distinct, to Auditor of Public Accounts, which shall be kept separate and distinct by him from all other taxes or revenues until paid to the public free schools." (Acts 1883–'84, p. 603.)

This act came under review of this court in *Greenhow, Treasurer*, vs. *Vashon*, 81 Va., 336, and was held valid and constitutional in an able and exhaustive opinion that rehabilitated the State with a part of her sovereignty, of which she had been despoiled by the extraordinary decision in *Antoni* vs. *Wright*, and gave hope that a fair and equitable settlement in which pecuniary obligations only commensurate with the resources of the State would be assumed. The opposing contention was that *Antoni* vs. *Wright*, and specially *Clarke* vs. *Tyler, Sergeant*, 30 Gratt., 134; and *Williamson* vs. *Massey, Auditor*, 33 Gratt., 237, had concluded the question otherwise. This case (*Greenhow, Treasurer*, vs. *Vashon*) was appealed with the greatest confidence to the Supreme Court of the United States, but that court, to the great consternation of the coupon holders, held the decision of this court to be correct. (*Vashon* vs. *Greenhow, Treasurer*, 135 U. S., 716.) It cannot be denied that the effect of this decision was to modify and limit the scope and effect of the funding act that made coupons receivable for all taxes, etc., and, as a consequence, overruled, *in toto*, *Clarke* vs. *Tyler*, and *Williamson* vs. *Massey, Auditor*, and in part *Antoni* vs. *Wright*.

In *Greenhow, Treasurer*, vs. *Vashon*, neither in this court nor in the Supreme Court of the United States, was any question raised as to what effect would result as to the rest of the act from declaring the provision of the funding act of 1871, in regard to the receivability of coupons for school

taxes, unconstitutional. That is now the question to be determined.

It is an elementary principle, so familiar that it need only be stated, that a contract illegal in part is incapable of being enforced, for *ex turpi contractu non oritur actio*. (Chitty on Contracts, *657.) The same author says:

> "A distinction has been taken in the books between a deed or condition void in part by statute and a case of such an instrument being in part void at common law. 'A statute,' it has been said, 'is like a tyrant—where he comes he makes all void; but the common law is like a nursing father—it makes only void that part where the fault is, and preserves the rest.' And it has been laid down that if a part of a deed or condition be contrary to a statute, the remainder (even, it seems to have been considered, though it be distinct) shall also be void. But this distinction cannot be supported; and a contract is void IN TOTO if a part of it be illegal either by virtue of statute or at common law." Idem, *693.

The general doctrine is that if the promise and the consideration are each entire, and the consideration is, even in part, illegal, the contract is void. (2 Addison on Contracts, Note 1, *1169.)

The case of *Collins* vs. *Blantern*, 1 Smith's Leading Cases, 155, fully sustains this view, and shows how relentless the courts are in declaring illegal contracts void *in toto*.

In the case of *Hinman* vs. *Woodruff*, 11 Vt., 592, Judge Redfield said for the court:

> "But it is fully settled that, when any portion of the entire consideration of a contract is against law, the whole contract is illegal, and cannot be enforced. If part of the consideration of a bill of exchange be the sale of spirituous liquors contrary to law, though the other parts be money lent, the entire contract is void, and no other part of it can be enforced. (Scott vs. Gilman, 3 Taunt. R., 266; Frotherstone vs. Hutchinson, Cro. Eliz., 199; Crawford vs. Morell, 8 Johns., 253.) The court have not been able to perceive any ground upon which the plaintiff can be permitted to recover upon this note, even to the amount of what was justly due him. This is but a reasonable punishment for including in his just dues that which he had no right to take."

In *Thompson* vs. *Collins*, 4 Head., 441 (Tenn.), the court said:

> "A contract containing on its face this or any other illegal stipulation cannot be enforced in a court of law and equity. No court will give its active aid upon such contract."

In the case of *Filson's Trustee* vs. *Himes*, 5 Pa. St., 452, Chief Justice Gibson concludes an able opinion in this language:

> "But in those cases distinct bargains were put in the same note; in this the bargain is one, the consideration is one, and the covenant is one, and all is void."

The case of *Kennett* vs. *Chambers*, 14 Howard (U. S. R.) 39, decides that—

> "No contract can be enforced in the courts, no matter where made or where to be executed, if it is in violation of the laws of the United States, or is in contravention of the public policy of the government," etc.

Marshall, C. J., speaking for the Supreme Court of the United States in the case of *Craig* vs. *State of Missouri*, 4 Peters, at page 436, said:

> "The certificates for which this note was given being in truth 'bills of credit,' in the sense of the Constitution, we are brought to the inquiry:
>
> "Is the note valid of which they form the consideration?
>
> "It has been long settled that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. * * * The consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration is the act of emitting bills of credit, in the mode prescribed by the law of Missouri, which act is prohibited by the Constitution of the United States. * * * A majority of the court feels constrained to say that the consideration on which the note in this case was given is against the law of the land, and that the note itself is utterly void."

In the case of *Thayer* vs. *Rock*, 13 Wend., 53, a contract had been made as well for the sale of real as of personal property, which was entire, founded upon one and the same consideration, and the same not being reduced to writing, it was held that it was void, as well in respect to the personal as the real property; Chief Justice Savage saying:

> "The action in this case was brought to enforce that part of the contract which, if it had stood alone, would have been good, but being a part of an entire contract, embracing another subject, in respect to which it was void, the whole was void. The contract was to sell the mill site and privileges, and also the wood and timber, and was an entire contract, entered into for one and the same consideration; the two subjects cannot be separated, and being void in part is totally void."

And the Chief Justice illustrates the principle of the decision in this manner:

> "So of the case put by counsel in argument: 'A sells to B an acre of land and a pair of horses for $500, all by one entire parol contract; the horses are delivered and the money paid. The counsel says that the title to the horses passes. Not so, I apprehend, for the contract as to the land being void, the whole is void. A may reclaim his horses or their value, and B may recover back his $500."

In the case of *DeBeerski* vs. *Paige*, 36 N. Y. R., 537, Davies, C. J., said:

> "It is well settled if part of one entire contract be void under the statute of frauds,

the whole is void; that the party shall not be permitted to separate the parts of an entire agreement and recover on one part, the other being void. (CHATER vs. BECKET, 7 Turn., 197, CRAWFORD vs. MURRELL, 8 John., 253.)

"When a note is given in payment of an account, some of the items of which are legal and some illegal, although an action would lie for so much of the account as is made up of lawful items, the note itself is entirely void; that the plaintiff cannot recover on the note to the extent of the lawful items, although they are distinctly severable from the unlawful."

3 Am. and Eng. En. of Law, page 887, Note 2.

In *Widoe* vs. *Webb*, it was held:

"The concurrent doctrine of the text books on the law of contracts is, that if one of two considerations of a promise be VOID merely, the other will support the promise; but that if one of two considerations be UNLAWFUL the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected, and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act or two or more acts part of which are unlawful; because the WHOLE CONSIDERATION is the basis of the WHOLE PROMISE. The parts

are inseparable. (METCALF ON CONTRACTS, 246; ADDISON ON CONTRACTS, 905; CHITTY ON CONTRACTS, 730; 1 PARSONS ON CONTRACTS, 456: 1 PARSONS ON NOTES AND BILLS, 217; STORY ON PROM. NOTES, § 190; BYLES ON BILLS, 111; CHITTY ON BILLS, 94.)

"Whilst a partial WANT OR FAILURE of consideration avoids a bill or note only PRO TANTO, ILLEGALITY in respect to a part of the consideration avoids it IN TOTO. The reason of this distinction is said to be founded, partly, at least, on grounds of public policy, and partly on the technical notion that the security is entire and cannot be apportioned; and it has been said, with much force, that where parties have woven a web of fraud or wrong it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound. (Story on Prom. Notes, and Byles on Bills, supra.) And, in general, it makes no difference as to the effect, whether the illegality be at common law or by statute. (See Authorities, supra.)"

Widoe v. *Webb*, 20 Ohio St., 431.

This court has fully recognized the doctrine contended for. The case of *Noyes' Ex'x* vs. *Humphreys*, 11 Gratt., 636, was as follows: N rents property from T, who undertakes to have certain improvements put up thereon, and he contracts with H to execute the work. H proceeds and does a part of the work and receives some payments from T; but finding that T is embarrassed, he stops the work, and declares that he will proceed no further with it. N then tells H to go on and finish the work and he will pay him. H then goes on and does the work; and, after it is done, settles with T and takes his bond for the balance

due him. T, being unable to pay him, H sues N for the whole balance due him for the work. It was held:

> "That the promise alleged in the declaration being an entire promise to pay as well for that done before as for that done after the promise, even if the promise would have been valid as to the work to be done, it was collateral as to that which had been executed, and being an entire promise, it is void as to the whole."

The then president of this court (Allen), at page 653, said:

> "The debt had been incurred, and though there may have been a sufficient consideration of benefit to the landlord in avoiding the loss of rents and the injury resulting from leaving the work in an unfinished state to have supported a promise to pay for the liability of Thompson, the promise would have been collateral, though on a good consideration, and must be in writing to be valid. But where the verbal promise is entire, and part of it relates to a matter which renders it necessary under the statute that the promise should be in writing, the whole promise is void. Being entire and part of it void, the whole is defective."

This is indeed pertinent language. Here the undertaking of the contract, expressed on the face of the coupon, was that it should

> "be receivable at and after maturity for all taxes, debts, dues, and demands due the State,"

and this court and the Supreme Court of the United States had solemnly determined that

> "the Legislature had no power to declare, or contract, that moneys due to the literary fund might be paid in coupons attached to the bonds authorized by the act of 1871."
>
> (*Vashon* vs. *Greenhow*, 135 U. S. R., 719.)

This contract was certainly entire. It was that

> "all taxes, debts, dues, and demands due the State"

might be liquidated in coupons. A part of it has certainly been declared illegal and void. It follows, therefore, *ex necessitate*, that the whole promise is defective and void. It should be borne in mind that it is not contended that the State does not owe the interest represented by the coupon, or that it is not under moral and legal obligation to pay such interest, but only that the contract to accept the coupon for "taxes, debts, dues, and demands" to the State, is void. The court is not asked to do so, nor could the court legally absolve the State from her duty to pay the principal and interest called for by the bonds issued under the act of 1871, according to the terms of the contract contained in the bond. The vice extended only to the tax-receivable feature of the contract. But it completely permeated and vitiated that feature.

The other distinct engagements by which the State had bound herself in the bond were legal, and can be enforced as any other contract made by her. Thus the principle contended for, that where there are contained in the same instrument distinct engagements, by which a party binds himself to do certain acts, some of which are legal, and some illegal, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot, has its full recognition.

As said by Mr. Justice Story in *United States* vs. *Bradley*, 10 Peters, 343, where may be found a good discussion of this question, it is well settled that in all cases where the different covenants or conditions are several and independent of each other, and do not import *malum in se*, those that are legal may be enforced, but not otherwise.

In closing this long-drawn-out argument, I cannot forbear to express the gratification I feel, in common with every lover of this State, at the acceptance by the creditors of the settlement offered in the act of 1892, and to say that in my opinion no one thing so effectively promoted the settlement as the decision of this court in the Vashon case. It only remains, to make the settlement complete and entire, for the court to take another step forward and wipe out entirely, as it has already done in part, the dangerous and hurtful doctrines enunciated in *Antoni* vs. *Wright*, and the Supreme Court will approve as it did in *Vashion* vs. *Greenhow*; for it cannot be doubted that but for our own court having held the funding act of 1871 constitutional in *Antoni* vs. *Wright*, the Supreme Court of the United States, in the case of *Hartman* vs. *Greenhow*, 102 U. S. R., 872, would have taken Mr. Justice Miller's view of the subject, who vigorously dissented in this the first case before that tribunal, and we should have been saved the losses and harassments of probably the most prolonged, acrimonious, and vexatious litigation that has ever engaged the attention of the courts on this continent.

R. TAYLOR SCOTT,
Attorney General of Virginia.

RICHMOND, VA., Jan. 13, 1896.

No. 125 Ex 3.

Brf. of Scott for D. C. (on reargum

Filed Jan. 25, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. ~~166~~ 125

A. A. McCULLOUGH, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF VIRGINIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

SUPPLEMENTAL BRIEF of R. Taylor Scott, Attorney-Gen'l of Virginia, and Answer to REPLY-BRIEF of Col. R. L. Maury, Counsel for PLAINTIFF IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 733.

A. A. McCULLOUGH, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF VIRGINIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

SUPPLEMENTAL BRIEF of R. Taylor Scott, Attorney-Gen'l of Virginia, and Answer to REPLY-BRIEF of Col. R. L. Maury, Counsel for PLAINTIFF IN ERROR.

In Col. R. L MAURY's elaborate "reply-brief" to the point made in answer to his assignment of errors the *Virginia Cases* and other decisions of this court cited and relied upon are based and rest upon, as I read and construe them, the decision made by the Supreme Court of Appeals of Virginia in *Antoni* v. *Wright* (22 Grat. 833), but that court has overruled and reversed *Antoni* v. *Wright*, and the view of that contention held by *Judge Waller R. Staples* as to the true meaning and legal effect of the "coupon contract," is *now* the law of Virginia; and this being the *environment* of the present controversy the decisions are not in point, and THIS CASE differs *toto coelo* from any heretofore adjudicated, and that I may make myself

clearer, will elaborate the points relied upon and presented in my *first* brief.

THE CASE STATED.

This record brings again before your honors, in one of its many and varied forms, the controversy long waged between the Commonwealth of Virginia and her creditors over *the coupon contract* attached to the bond issue of 1871 and 1879. *The last* decision upon this subject will be found in the elaborate and able opinion of *Mr. Justice Bradley* in *McGahey* v. *Virginia*, reported in 135 U. S., 664.

The plaintiff in error, as provided by statute, presented to the trial court [the Circuit Court of Norfolk city, in Virginia,] certain coupons alleged to have been cut from genuine bonds of the Commonwealth of Virginia for identification and verification, and obtained judgment against the State.

Appeal was taken to the Supreme Court of Appeals of Virginia, and the *nine* assignments of error will be found on pages 4 to 8, and the appellant's petition on page 9 of the record; the trial court was reversed March 15th, and this writ of error allowed *June 13, 1894*.

For the Commonwealth of Virginia my contention is:

First.

That in this record no "Federal question" is presented; that as decided *May 18, 1896*, in *Bacon* v. *Texas*, [*Advanced Sheets U. S. R., Lawyer's Co-op. Pub. Co., No. 15, p. 1080.*]

"2. A contract can only be impaired within the meaning of the U. S. Constitution, so as to give this court jurisdiction on writ of error to a State court, by some subsequent statute of the State which has been upheld or given effect by the State Court.

"3. The decision by the State Court that an alleged contract never existed because of the want of a compliance with a State statute, whereupon judgment is given wholly without reference to a subsequent statute, which is alleged to have im-

paired the obligation of the contract, does not involve a *Federal question.*

"4. A change by *a State Court* of its construction of a State statute, even if its former construction had become a rule of property, cannot constitute *a Federal question* as to the impairment of the obligation of a contract for which a writ of error will lie from the Supreme Court of the United States to a State Court."

"The case is not altered," said *Mr J. Peckham*, "by the fact that the State has passed an act which the defendants assert impairs the obligation of their contract so long as the court in deciding their case holds that they never had a contract, because they never had complied with the provisions of the original statute, and so long as it gives judgment wholly without reference to the subsequent act and without upholding or in any manner giving effect to any provision thereof."

To the argument that the construction of its statutes by Texas courts followed for many years made such construction *a rule of property* persons were entitled to rely upon, and no court could overturn without thereby impairing the obligation of the contract, this learned judge answered: "*Such a foundation for our jurisdiction does not exist.*"

In *Fallbrook Irrigation District* v. *Bradley*, decided November 16, 1896 [68 Federal Reporter, 948,] the same judge said this court would "not be justified in holding the act [California's statute concerning irrigation] to be in violation of the State Constitution in the face of clear and repeated decisions of the highest courts of the State to the contrary, under the pretext that we were deciding principles of general constitutional law."

And in *First Nat. Bank of Garnett, Kansas*, v. *Ayers, Sheriff*, 160 U. S., 660–662, "this court is bound by the interpretation given to the Kansas statute by the Supreme Court of that State," and cited *New York* v. *Weaver*, 100 U. S., 539–541.

Mr. J. Gray, in the *Missouri Pac. R. Co.* v. *Nebraska*, argued *December 3, 4, 1894*, ordered for re-argument *December 17, 1894*, and re-argued *March 4, 1896*, held: "The Supreme

Court of Nebraska has construed this statute as authorizing the Board of Transportation to make the order questioned in this case, which required the railroad to grant to the relators the right to erect an elevator upon its right-of-way *at Elmwood Station* on the same terms and conditions on which it had already granted to other persons rights to erect two elevators thereon.

"The construction so given to the statute by the highest court of the State must be accepted by this court in judging whether the statute conforms to the Constitution of the United States."

MR. COOLEY, discussing this subject [Cooley's Const. Lims., 6 Ed'n, p. 341.], says:

"It would seem, therefore, to be the prevailing opinion, and one based upon sound reason, that *the State* cannot barter away or in any manner abridge or weaken any of those essential powers which are inherent in all governments, and the existence of which, in full vigor, is important to the well-being of organized society; and that any contracts to that end are void upon general principles, and cannot be saved from invalidity by the provisions of the National Constitution now under consideration.

If "*The Tax-cases* are to be regarded as an exception to this statement. The exception is, perhaps, to be considered a nominal rather than a real one, since taxation is for the purpose of providing the State a revenue, and the State laws which have been enforced *as contracts* in these cases have been supposed to be based upon consideration by which the State receives the benefit which would have accrued from an exercise of the relinquished power in the ordinary mode."

"Perhaps the most interesting question which arises in this discussion is, whether it is competent for the Legislature to so bind up its own hands by a grant as to preclude it from exercising for the future any of the essential attributes of sovereignty in regard to any of the subjects within its jurisdiction; whether, for instance, it can agree that it will not exercise the

power of taxation or the police power of the State, or the right of eminent domain as to certain specified property or persons; and whether, if it shall undertake to do so, the agreement is not void on the general principle that the Legislature cannot diminish the power of its successors by irrepealable legislation, and that any other rule might cripple and eventually destroy the government itself.

"If the Legislature has power to do this, it is certainly a very dangerous power, exceedingly liable to abuse, and may possibly come in time to make the constitutional provision in question as prolific of evil as it ever has been or is likely to be of good." *Id.*, p. 337.

Mr. Chief Justice Marshall refused to admit, and did not follow the distinction taken in *Hamilton* v. *Dudley*, 2 Pets., 524. He said:

"The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law."

And in *Elmendorf* v. *Taylor*, 10 Wheat., 549: "The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."

Mr. Justice McLean, in the remarkable case, *Green* v. *McNeal*, 6 Pets., 298, in which *this* court reversed its own construction of Tennessee's statute of limitations and adopted that of the Tennessee court, formulates this principle as follows: "The decisions of the highest judicial tribunals of a State should be considered as final by this court, not because the State tribunal in such case has any power to bind the court, but because, in the language of the court in *Shelby et als* v. *Guy*, 11 Wheat., 361, 'a fixed and received construction by a State in its own court makes a part of the statute law,' and in the words of Chief-Justice Taney, in *Martin* v. *Waddill*, 16 Pets., 410, 'the sanction of the judicial authority of the State is given to it. * * * This decision, made upon such a question with great deliberation and research, ought, in our judgment, *to be conclusive.*'"

The Federal question presented to this court in *Lloyd* v. *Matthews*, 155 U. S., 222, was whether or not Ohio's statute concerning the transfer of stock had been given full faith and credit by the Kentucky Court of Appeals in deciding the questions before it, and Chief-Justice Fuller said: "If every time the courts of a State puts a construction upon the statutes of another State, this court may be required to determine whether that construction was or was not correct, upon the ground that if it was concluded that the construction was incorrect, it would follow that the State courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

Mr. Justice Matthews, in *ex parte Ayers*, 123 U. S., 143, thus formulates this principle:

> "It cannot be doubted that the eleventh amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisiana* v. *New Orleans*, 102 U. S., 203. That obligation, by virtue of the provision of Article I., section 10, of the Constitution of the United States, cannot be impaired by any subsequent State legislation. Thus not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the eleventh amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially

without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion. Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity without any violation of the obligation of its contract in the constitutional sense. *Beers* v. *Arkansas*, 20 How., 527; *Railroad Co.* v. *Tennessee*, 101 U. S., 337. The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

In *Hartman* v. *Greenhow*, 102 U. S., 672-686, one of the first cases before this court after the decision of *Antoni* v. *Wright* by the Supreme Court of Appeals of Virginia, Mr. Justice Miller

vigorously dissented, in language strong, striking and forcible. He said:

> "I dissent from the judgment of the court. In addition to the general proposition I have always maintained *that no Legislature of a State has authority to bargain away the State's right of taxation.* I am of opinion that in issuing the bonds and coupons, which are the subject of this controversy, the Legislature of Virginia, neither in terms nor by any just inference, made any contract that the bonds and coupons should not be subject to the same taxes as other property taxed by the State."

The cases of *Woodruff* v. *Trapnall*, 10 How., 190; *Furman* v. *Nichol*, 8 Wall., 44; and *Murray* v. *Charleston*, 96 U. S., 432, are quoted with approval and cited by Mr. Justice Field, to uphold the doctrine that when *States* issue bonds or guarantee the issue of banks, the undertaking is *a contract* within the meaning of Article I., Section X., sub-section 1, of the Federal Constitution, which can be enforced by this court *non obstante* the eleventh amendment to this instrument.

In the burning and eloquent words of *Judge Staples*, who dissented in *Antoni* v. *Wright*, 22 G., 833:

> "I do not consider either of the cases as involving the question arising in this, and with the greatest possible respect for my brethren, I do not believe the Supreme Court of the *United States* will ever hold that one Legislature can by any form of enactment bind succeeding legislatures and the public revenue in the manner attempted in the provisions of the funding act, and until they so decide I am not willing that this court should sanction a precedent which may prove most disastrous to all the vital interests of the State, and under authority of which, practi-

> cally, liens and mortgages may be given upon the future revenues of the State by statutes assuming the form of contracts."

I emphasize this fact, that notwithstanding the decisions in—

Hartman v. *Greenhow*, *supra*;
Poindexter v. *Same*, 114 U. S., 270;
Moore v. *Same*, 114 U. S., 340;
Sands v. *Edmonds*, 116 U. S., 587;
Stewart v. *Virginia*, 117 U. S., 614;
Baltimore & Ohio R. R. v. *Allen*, 114 U. S., 311;
Royall v. *Virginia*, 116 U. S., 517.

In *McGahey* v. *Virginia*, 135 U. S., 662, this court held *the coupon* (properly called "the cut-worm of Virginia's treasury,") could not pay the *liquor-tax*, *school-tax*, or *fines*.

Why? *Because the sovereign Commonwealth so willed and so her statutes enact!*

The sovereign's will *is* the law of her contract, else there is not, there cannot, be *sovereignty*. Lay *judicial hands* upon the *State's revenues* and *the State* is dead—a thing of naught—an empty and unmeaning name.

Judge Richardson, speaking for *four* of the *five* judges who decided *this* case, *held:*

> "In view of those decisions, and being entirely satisfied that the COUPON FEATURE of the act of 1871, *which is distinct and separable from the main features of the act*, is tainted with the vice of ILLEGALITY, which renders THE WHOLE COUPON CONTRACT illegal and void, WE take, in view of the said Supreme Court decisions, the one additional necessary step, and declare THE WHOLE COUPON CONTRACT ABSOLUTELY ILLEGAL AND VOID."
>
> * * * "For these reasons we reverse and annul the judgments respectively in each of the above-named cases."

Commonwealth v. *McCullough*, 90 Va., 619–620.

The construction of the Constitution of Virginia and the powers of her General Assembly to enact the laws which authorized the issue of her bonds, and the true meaning, binding force and effect of the THE COUPON CONTRACT attached to the bonds, does not present to this court "a Federal question" within the true meaning of the Constitution of the United States; therefore, this writ of error should be dismissed.

Second.

THE COUPON CONTRACT is not the contract of the Commonwealth of Virginia.

Virginia's Constitution dedicates the "school-tax" to her public schools, "fines," to the "literary fund," and her statute laws require the "liquor license," and ALL TAXES shall be paid in gold and silver coin of the United States, treasury notes, or national bank notes. The ground on which this court placed its decisions, in *McGahey* v. *Virginia*, was this: That the State Constitution declared a trust, and devoted a specific portion of the State's taxes to public schools and to the literary fund, and the sale of liquor was *absolutely* within the power and control of the Legislature. Is not the duty imposed by the Constitution upon the Legislature of Virginia to keep open the courts and the State's hospitals for the insane and blind, provide proper compensation for officials, and promote the general welfare of the people equally a trust, and of as binding obligation upon *this court?*

Do not legislators fresh from the people know their financial condition and their ability to endure the burdens of taxation? When the point is reached that this burden becomes intolerable and it is declared that the State's *revenue*—its life-blood—must be paid in gold and silver, United States treasury notes and national bank notes—must not this expression of sovereign legislative will be equally respected, *this* law enforced, and *this* trust executed?

To hold otherwise will be to deal a death blow to an essential and vital power of *State government.*

Taxes to be levied by legislatures to be assembled are not "assets" *in esse*, and cannot be appropriated. The Legislature *in session* cannot impair, injure, or destroy the constitutional and sovereign powers of its *successors*.

The theory and practice of our government—State and Federal—*this:* The whole subject of taxation, raising and collecting public revenue, and its appropriation is under the control of the Legislature *in session*, and a sovereign power which cannot be surrendered or parted with by contract.

The term *contract*, as used in the Federal Constitution, does not embrace or include, nor does it apply to rights and interests growing out of measures of public policy, and though rights and interests be acquired under and by virtue of such laws, they are not violated *in the constitutional sense* by enacting subsequent laws, even though thereby they are destroyed.

Exparte Ayers, 123 U. S., 143.

In *Ohio Ins. and Trust Co.* v. *DeBolt*, 10 How., 416, *Chief-Justice Taney* said: "They (the Legislature) cannot, therefore, by contract deprive a future Legislature of the power of imposing any tax it may deem necessary for the public service *or of exercising any other act of sovereignty confided to one legislative body*, unless, indeed, the power to make such contracts is conferred upon them by the Constitution of the State."

The reason for this is plain—"Revenue is the State." Appropriations are made and set apart in advance of the receipt of taxes into the treasury, such as the support of the civil and military service, expenditures necessary for the institutions—literary and eleemosynary—and if the funds be diverted or applied to objects for which they were not destined, the public service would be paralyzed, and "confusion worse confounded" follow.

States are not like the citizen. Their (the States') mission is to govern and direct the ramified and ever-changing affairs of men; their obligations bind to the past and reach forward to the future. The State's measure of duty and obligation, the greatest good to the greatest number—PRO BONO PUBLICO. As was said by *Judge Staples* in *Antoni* v. *Wright*, *supra*:

"In Virginia it has been the uniform practice for each Legislature to impose the taxes necessary for the purposes of the government during the existence of such Legislature; and this attempt—*thirty years in advance*—to appropriate the sum of TWO MILLIONS YEARLY to a specific purpose, beyond the control of every power in the State, is believed to be without precedent in the history of this or any other State. If there be any advantage in the frequent recurrence of popular elections, it is only in the fact that the burdens annually laid upon the people are imposed by those fresh from their midst and familiar with *their* condition, wants, and circumstances. An *irrepealable* law, therefore, imposing taxes to a large amount and dedicating the revenue thus raised to any specific object—even the payment of a public debt—would seem to be contrary to the genius and spirit of our institutions.

"If some future Legislature, in an hour of madness or folly, should provide that the bonds of the State should be received in payment of all public dues, we must equally hold that such legislation constitutes a valid and binding contract. This is the necessary result of the decision just made."

It follows, therefore, as I view this matter, that there was no power in Virginia's General Assembly to impart to the "coupon contract" TAX-PAYING POWERS.

Third.

THIS IS A "MOOT-CASE."

The States of the Union are independent and indestructible sovereignties, the makers and creators of the Federal Constitution, and without her consent the sovereign State cannot be sued or subjected to the process of courts. Virginia, it is

true, consented to this suit, but the statutes, one and all, whereby her consent was given have been repealed and this consent withdrawn, *therefore this controversy and contention is ended.* See Acts 1893–4, page 381, approved February 21, 1894, in force from its passage. It logically and necessarily follows that no court of the Commonwealth of Virginia can now exercise jurisdiction over her, or empowered by her constitution and laws to rehear this case, or to execute the mandate of your Honors should the judgment complained of be reversed; therefore, THE JUDGMENT APPEALED FROM IS IRREVERSIBLE, VALID, BINDING, AND FINAL.

The Supreme Court of Appeals of Virginia so held in *Maury* v. *Commonwealth*, 92 Va., 310, and so holding followed.

Hollingsworth v. *Virginia*, 3 Dall., 378;
Beers v. *Arkansas*, 61 U. S., 20;
Bank of Washington v. *Same*, 61 U. S., 530;
Exparte McCaudle, 7 Wall., 506;
John Gut v. *Minnesota*, 9 Wall., 35;
South Carolina v. *Gaillard*, 101 U. S., 433.

Discussing this subject, the Editors of the *Virginia Law Register*, Vol. I, No. 10, February, 1896, page 772, thus state the principle: "It seems to be well settled that when by reason of matters arising subsequent to an appeal and *dehors* the record, it is impossible for the court to grant the relief sought, the appeal will be dismissed; and extrinsic testimony may be introduced to establish the facts relied on to sustain the motion to dismiss."

Thus in *Flanagan* v. *Central Lunatic Asylum*, 79 Va., 554, it was held that where a pending appeal involving the question of appellant's right to a certain office, the office is declared vacant by act of Legislature, and the Governor, under due authority, has appointed another incumbent, the appeal will be dismissed. The case of *Mills* v. *Green*, recently decided by the United States Supreme Court, November 25, 1895, affords an excellent illustration of the rule. The original controversy was over the right of the plaintiff to vote at a certain election.

Before the appeal was entered in the Supreme Court the day for the election had passed. We reproduce the following extract from the opinion of *Mr. Justice Gray:*

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot qustions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of the lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence."

Lord v. *Veasie*, 49 U. S., 8 How., 251;
California v. *San Pablo & T. R. Co.*, 149 U. S., 308.

* * * * * * * *

> "But if the intervening event is owing either to the plaintiff's own act or to a power beyond the control of either party, the court will stay its hand."

Mills v. *Green*, 159 U. S. R., 651–3;
Shumate v. *Spilman*;
Virginia Law Journal, 1886, p. 443.

My conclusion is that the writ of error granted A. A. McCullough, upon sound principles and established precedents, should be dismissed *with costs* and the Commonwealth of Virginia freed from the costly and harrassing litigation she has been subjected to for almost a quarter of a century. It is certain

that A. A. McCULLOUGH, the plaintiff in error, purchased his coupons with full knowledge of their *status*, of Virginia's construction of the "coupon contract," her refusal to accept "coupons" in payment of the taxes assessed upon persons and property; that the largest revenue to be obtained by taxation was wholly insufficient and inadequate to keep open her hospitals, execute the law, and meet the interest upon her bonded debt—a debt unwisely, not to say improvidently and without due consideration assumed; that Virginia is a sovereign Commonwealth not liable to be sued or subjected to "judicial process," and that to accept coupons in payment of her taxes would be for that Commonwealth political self-destruction; therefore, he is not entitled to especial consideration or favor, and should receive none from this court.

R. TAYLOR SCOTT,

Attorney-General of Virginia,

Counsel for the Commonwealth of Va., Defendant in Error.

RICHMOND, VA., Jan. 13, 1897.

In the Supreme Court of the United States.

No. 733.

A. A. McCULLOUGH, PLAINTIFF IN ERROR,

versus

COMMONWEALTH OF VIRGINIA,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR THE COMMONWEALTH OF VIRGINIA BY HENRY R. POLLARD, ASSOCIATE COUNSEL.

Interest rei publicea et sit finis litium.

THE CASE STATED.

This was a statutory proceeding by petition in the Circuit Court of Norfolk city, Virginia, against the Commonwealth of Virginia, having for its object the ascertainment of the fact whether certain coupons, which had been clipped from the bonds of the State of Virginia, and which had been tendered by the petitioner for his taxes, were "genuine coupons, legally receivable for taxes, debts and demands" due the State. The original statute that au-

thorized the suit may be found in the Acts of the General Assembly of Virginia, 1881–2, p. 10, and is also copied in the opinion of Chief Justice Waite in *Antoni* v. *Greenhow*, 107 U. S., R. p. 769, and appears in the general codification of the laws of the State made in 1887, as sections 406–8, Code of Virginia, 1887.

That the court may see the object of the statute, and mischief intended to be remedied, we beg to give the title of the act and to make the following quotation from the preamble of the act:

"Chap. 7.—An act to prevent frauds upon the Commonwealth and the holders of her securities in the collection and disbursement of revenues. Approved January 14th, 1882.

"Whereas, bonds purporting to be bonds of this Commonwealth issued by authority of the act of March 13, 1871, entitled an act to provide for the funding of the public debt, and under the act of March 28, 1879, entitled an act to provide a plan of settlement of the public debt, are in existence without authority of law;

And whereas, other bonds are in existence which are spurious, stolen or forged, which bonds bear coupons in similtude of genuine coupons receivable for all taxes, debts, and demands due the Commonwealth;

And whereas, the coupons from such spurious, stolen or forged bonds are received in payment of taxes, debts and demands;

And whereas, genuine coupons from genuine bonds, after having been received in payment of taxes, debts and and demands, are fraudulently reissued, and received more than once in such payments;

And whereas, such frauds on the rights of the holders of the aforesaid bonds impair the contract made by the Commonwealth with them, that the coupons thereon should be received in payment of all taxes, debts and demands due the Commonwealth, and at the same time defraud her out of her revenues;

Therefore, for the purpose of protecting the rights of said bondholders and of enforcing the said contract between them and the Commonwealth, preventing frauds in the revenue of the same," etc.

To the petition filed under this statute, the Commonwealth entered a demurrer, and for one of the five causes of demurrer alleged:

"1. The acts of the General Assembly in the said petition mentioned (viz.: the funding bills of 1871 and 1879) are in conflict with the seventh and eighth sections of Article VIII, of the Constitution of the State of Virginia, and with sections 2 and 113 of the act of the General Assembly, passed in pursuance thereof, approved March 15, 1884, to the extent that said acts of March 30, 1871, and of March 28, 1879, provide that the coupons therein mentioned shall be receivable at and after maturity for all taxes, debts, and demands due the State which shall be so expressed on their face."

This pleading was intended to present the question whether, in view of the decision in *Vashon* vs. *Greenhow*, 135 U. S., 716, the stipulation printed on the coupons, that they should be "*receivable for all taxes, debts, dues and demands due the State*" was *a legal and binding contract on the State*. This was the sole question raised. The Circuit Court rejected this defence as invalid, and the Commonwealth appealed to the Supreme Court of Appeals of the State, which reversed the lower court, and sustained the defence, and determined that, inasmuch as the alleged contract was *tainted with the vice of illegality*, as determined by this honorable court in the case of *Vashon* v. *Greenhow*, 135 U. S., 716 (holding that the legislature could not constitutionally provide for the payment of *all* taxes in coupons on account of the constitutional requirement to appropriate a certain part of all taxes *for public free school purposes*), it, as a consequence, was, under the well known maxim *ex turpi concractu non oritur actio*, wholly void and incapable of being enforced. From this

decision an appeal was taken by the petitioner to this court.

On the Motion to Dismiss.

It is now and here urged by the Commonwealth that the appeal should be dismissed for either, or both, of the following reasons:

First. *Because since the institution of the proceedings in the Circuit Court the statute authorizing the suit against the State has been repealed.* Acts of General Assembly 1893-4, p. 381.

There is no principle better settled than that a sovereign State cannot be sued except by its consent. *Board of Liquidation* vs. *McComb*, 92 U. S., p. 541.

In re Ayres, 123 U. S., 443, 504-5, this court, speaking through Mr. Justice Mathews, said:

"It cannot be doubted that the 11th Amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisiana* v. *New Orleans*, 102 U. S., 203. That obligation, by virtue of the provision of Article 1, sec. 10, of the Constitution of the United States, cannot be impaired by any subsequent State legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. *It is different with contracts between individuals and a State.* In respect to these, by virtue of the 11th Amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out the honor and good faith of the State itself, and these are not subject to coercion. *Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it*

may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense. Beers v. *Arkansas*, 20 How., 527; *Railroad Co.* v. *Tennessee*, 101 U. S., 337."

It is equally well settled that where this consent is withdrawn by the repeal of the statute authorizing the suit, that no new suit can be brought, and all pending suits must be dismissed.

The case of *Hollisworth* v. *Virginia*, 3 Dallas, 378, was pending in a Federal Court when the Eleventh Amendment to the United States Constitution was adopted, taking away jurisdiction from the Federal courts of suits "against one of the United States," and it was there unanimously held that the suit fell and could not be proceeded with.

The case of *South Carolina* v. *Galliard*, 101 U. S., 433, is strikingly in point. Under an act of the South Carolina Legislature, in order to secure the acceptance for taxes of the bills of the Bank of the State, a certain mode of proving their genuineness was prescribed. After bills had been tendered for taxes and deposited with the State officials, to be proved as required, the act was repealed, and it was there held (see page 438) that "the suit could not be instituted after repeal, and, even if it had been already instituted, it could not be further prosecuted." See also *Railroad Company* v. *Grant*, 98 U. S., on page 401, and *National Exchange Bank* v. *Peters*, 144 U. S., 570. In this last case, Fuller, Chief Justice, said "that if a law conferring jurisdiction is repealed without reservation as to pending cases, all such fall with the law." And this case shows that this principle applies to appellate, as well as to courts of original jurisdiction.

But, further, the Supreme Court of Appeals has had the scope and effect of this repealing statute under review, and held that all pending suits instituted under the statute repealed fell with the repeal. See *Maury* v. *Commonwealth*, 92 Va., 310.

The suggestion made on page 39 of the brief of the learned counsel for the plaintiff in error, that the Commonwealth cannot rely upon the reason now being urged for a dismissal of the appeal, because the case was decided in the Supreme Court of Appeals after the repealing act was passed, we do not think tenable. For, if the Supreme Court of Appeals was without jurisdiction, then surely this court is likewise without jurisdiction. If it was without jurisdiction, then its mandate reversing the judgment of the Circuit Court of Norfolk City was a nullity, and the judgment of the Circuit Court which was in favor of the appellant is binding and effective, and the plaintiff in error has nothing to complain of in this forum or elsewhere.

Nor is the like contention sound that the repealing act is unconstitutional and void.

(1) Because the repealing act has been expressly declared constitutional and valid by the Supreme Court of Appeals. *Maury* v. *Commonwealth*, *supra*.

(2) Because, even if this be now an open question, it is true that during the existence of the statute, no interests were, nor could be, vested under or by virtue of it. Keith, P. of the Supreme Court of Appeals, thus defines its scope and object: "It merely enabled the couponholder to tender his coupons to the collecting officer, whose duty it then became to deliver them, securely sealed up, to the judge of the Circuit Court. The tax-payer was then authorized to file his petition against the Commonwealth, and a summons to answer the petition was served on the attorney for the Commonwealth. An issue having been made, a jury was to be impannelled to try whether the coupons tendered were the genuine coupons of the State, legally receivable for taxes. If the jury found in the affirmative, the judgment of the court, which of course followed the verdict, was required to be certified to the treasurer, who was then to receive the coupons, and refund the money theretofore paid by the petitioner, out of the money in the treasury, in preference to all other demands. The court was not

authorized to render a judgment for the payment of the money. Its function ended when the issue joined as to the genuineness of the coupons was determined. Its whole duty was to certify to the treasurer the fact that the coupons tendered were or were not genuine, as ascertained by the verdict, and, having done this, its jurisdiction was exhausted. It was clothed with no power to enforce its judgment under the section now being considered." *Maury* v. *Commonwealth*, 92 Va., 313.

Alongside of this lucid statement, the same able judge, to sustain the conclusion of the court, aptly quotes from Chief-Justice Waite, in *Railroad* v. *Tennessee*, 101 U. S., 339; "The remedy which is protected by the contract clause of the Constitution is something more *than having a claim adjudicated*.. Here judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such an inquiry before there can be said to be a remedy which the Constitution deems part of a contract. *Inquiry is one thing; remedy another.* Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established, if the right is no more available afterwards than before. The Constitution preserves only such remedies as are required to enforce a contract.

"Here the State has consented to be sued only for the purpose of adjudication. The power of the courts ended when the judgment was rendered. In effect, all that has been done is to give persons holding claims against the State the privilege of having them audited by the courts instead of some appropriate accounting officer. When a judgment has been rendered, the liability of the State has been judicially ascertained, but there the power of the court ends. The State is at liberty to determine for itself whether to pay the judgment or not. The obligations of the contract have been finally determined, but the claimant has still only the faith and credit of the State to rely on for their fulfillment. The courts are powerless. Every-

thing after the judgment depends on the will of the State."

Indeed, the learned President of Supreme Court of Appeals was not left to *precedent*, he might have said the scope and effect of this act was *res judicata*, for this court, in *Stewart* v. *Commonwealth*, 117 U. S., 612, had considered the question, and had expressly decided that the only issue triable in a proceeding under this statute did not, and could not, "involve any question arising under the Constitution or laws of the United States."

(3) Even though the question be an open one, and though the coupon-holder had a substantial remedy by virtue of the statute, yet the repealing act is valid, for there was left an affective and reasonable mode to the coupon-holder to enforce his rights.

The bearing and effect of a repeal of remedies in existence at the time of the making of contracts have been frequently under consideration in and passed on by this court. Many of the cases are reviewed, and the result concisely stated in *Tennessee* v. *Sneed*, 96 U. S., 69. It is there said:

"If a particular form of proceeding is prohibited and another left, or is provided, which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not violated."

The repeal of the statute giving the new remedy left the coupon-holder just where he was before. For, however it may be elsewhere, in Virginia, the repeal of a statute which took away a common-law right revives such right. *Insurance Company* v. *Barley*, 16 Gratt., 363. *Booth* v. *Commonwealth*, *Id.* 519, and *Moseley* v. *Brown*, 76 Va., 419.

By the act of January 14, 1882, the common law remedy by *mandamus*, which this court had declared efficacious to compel the reception of coupons for taxes (*Hartman* v. *Greenhow*, 102 U. S., 672), was repealed, and the new remedy by petition provided, hence, under the decisions above cited, the repeal of this new proceeding re-

vived the remedy by *mandamus*, which was the only substantial remedy the coupon-holder had at the making of the alleged contract on the part of the State.

If it be true, as claimed, that the coupon-holder has no other statutory remedy left after the repeal, then, by the very terms of the statute defining the jurisdiction of the Supreme Court of Appeals in cases of *mandamus*, the coupon-holder has his remeby by *mandamus* preserved.

That statute is in the following words:

"Sec. 3036. JURISDICTION OF WRITS OF MANDAMUS AND PROHIBITION.—The said Supreme Court, besides having jurisdiction of all such matters as are now pending therein, shall have jurisdiction to issue writs of *mandamus* and prohibition to the Circuit and Corporation Courts, and to the Hustings Court and the Chancery Court of the city of Richmond, and in all other cases in which it may be necessary to prevent a failure of justice, in which a *mandamus* may issue according to the principles of the common law; *provided*, that no writ of *mandamus*, prohibition, or any other summary process, whatever, shall issue in any case of the collection of the revenue, or attempt to collect the same, or to compel the collecting officers to receive anything in payment of taxes except gold or silver coin, United States Treasury notes, or national bank notes, or in any case arising out of the collection of revenue in which the applicant for the writ or process has any other remedy adequate for the protection and enforcement of his individual right, claim, and demand, if just." Code 1887, page 742.

The coupon-holders as strenuously object to the repeal of this act as they formerly protested against its validity. In the case of *Antoni* v. *Greenhow*, 107 U. S., 769, their contention was that the act violated their contract with the State. Now and here their contention is that the repealing act disturbs a vested right, and is, therefore, unconstitutional and void. To point out the inconsistency of these contentions is to answer them.

Second. *Because the record presents no question subject to review in this court.*

The question presented to the Supreme Court of Appeals in this case was not whether the State had passed a law impairing the obligation of a contract, as was so frequently and so variedly presented in the multitudinous cases heretofore arising, but it went further and cut deeper than this. *The question was could the State under her Constitution make any valid or binding contract to receive coupons in payment of "all taxes, debts, dues and demands due" her?*

This was not a Federal question. But was a question which this court has in all the cases accepted as settled by the Supreme Court of Appeals of Virginia. In the very first case (*Hartman* v. *Greenhow*, 102 U. S., 672), this court grounded its decision as to the constitutionality of a statute forbidding the reception of coupons for taxes upon the decision of Supreme Court of Appeals (*Antoni* v. *Wright*, 22 Gratt., 833), that a valid and binding contract had been made by the State with the coupon-holders. Mr. Justice Field, on page 681, speaking of the decision of that court, said: "The provision of the Funding Act was shown, by reasoning perfectly conclusive, to be a contract founded upon valuable considerations and binding upon the State." So in the case of *Antoni* v. *Greenhow*, 107 U. S., 669, Chief-Justice Waite, delivering the opinion of the court, starts out with the proposition that the Supreme Court of Appeals had three times determined that a binding contract had been made by the State, which she must keep, citing *Antoni* v. *Wright*, 22 Gratt., 833; *Wise* v. *Rogers*, 24 Gratt., 169, and *Clarke* v. *Tyler*, 30 Gratt., 134. Now this last case, as well as the case of *Williamson* v. *Massey*, 33 Gratt., 237, went to the great length of holding that the coupon contract was potent even to the extent of compelling the reception of coupons, if tendered in payment of *fines and forfeitures*, which, under the Virginia Constitution (Sections 7 and 8, Article VIII),

were dedicated to public free-school purposes. The logical sequence of the first decision (*Antoni* v. *Wright*), was thus reached, and its appalling effect caused the court in *Greenhow* v. *Vashon*, 81 Va., 336, to re-examine these decisions, and, after full consideration, it was determined that taxes dedicated to public free-school purposes by the Constitution, whose adoption antedated the coupon contract, could not be intercepted by the coupon, aptly denominated by a distinguished Federal judge as "the cutworm of the treasury." With the greatest confidence, this decision was bought here for review, but this court followed, as it has always done, the construction that the State by its highest court puts upon its Constitution, and affirmed the case (*Vashon* v. *Greenhow*, 135 U. S., 713), Mr. Justice Bradley saying: "We think that the position of the Court of Appeals in this case is well taken, *that coupons could not be made receivable as a part of the literary fund; and that, if they could not be received as a part of the fund, they could not properly be made receivable for the taxes laid for the purpose of maintaining said fund.*"

With this right secured, which had been for a time denied by her highest court, the Commonwealth felt that she had a right to call for an examination of *the effect of the holding in Vashon* v. *Greenhow*, and that is whether the legal sequence of that decision must not result in the determination that the whole coupon contract was void for the taint of illegality. So that question was presented in the case at bar, and the Supreme Court of Appeals so held. To sustain this contention, the Commonwealth did not rely on any statute passed after the making of the coupon contract, nor did the court place its decision on any such statute, but simply and wholly on her Constitution that antedated the creation of the coupon, and on the principles of the common law.

Sections 7 and 8 of Article VIII of the State Constitution are as follows:

"Sec. 7. The General Assembly shall set apart, as a permanent and perpetual and literary fund, the present literary funds of the State, the proceeds of all public lands donated by Congress for public school purposes, of all escheated property, of all waste and unappropriated lands, of all property accruing to the State by forfeiture, and all fines collected for offenses committed against the State, and such other sums as the General Assembly may appropriate.

"Sec. 8. The General Assembly shall apply the annual interest on the literary fund, the capitation tax provided for by this Constitution for public free school purposes, and an annual tax upon the property of the State of not less than one mill nor more than five mills on the dollar, for the equal benefit of all the people of the State, the number of children between the ages of five and twenty-one years, in each public free school district, being the basis of such division. Provision shall be made to supply children attending the public free schools with necessary text-books, in cases where the parent or guardian is unable, by reason of poverty, to furnish them. Each county and public free school district may raise additional sums by a tax on property for the support of public free schools. All unexpended sums of any one year in any public free school district shall go into the general school fund for redivision the next year; provided, that any tax authorized by this section to be raised by counties or school districts shall not exceed five mills on a dollar in any one year, and shall not be subject to redivision, as hereinbefore provided in this section."

The conditions under which this court can take jurisdiction and look for itself into the question whether a valid contract has been made are thus stated and classified by Mr. Justice Gray in *Water Co.* v. *La. Sugar Co.*, 125 U. S., at p. 38:

"The result of the authorities, applying to cases of contract the settled rules, that in order to give this court

jurisdiction of a writ of error to a State court, a Federal question must have been, expressly or in effect, decided by that court, and, therefore, that when the record shows that a Federal question and another question were presented to the court and its decision turned on the other question only, this court has no jurisdiction, may be summed up as follows: (1) When the State court decides against a right claimed under a contract, and there was no law subseqent to the contract, this court clearly has no jurisdiction. (2) When the existence and the construction of a contract are undisputed, and the State court upholds a subsequent law, on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has juridiction. (3) When the State court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and, if it is of opinion that it did not confer the rights affirmed by the State court, and, therefore, its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. (4) So, when the State court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld. But when the State court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction."

The metes and bounds of the ground of this jurisdiction, before rather ill-defined, thus became stable and fixed, and have been strictly followed.

In *Huntington* v. *Attrill*, 146 U. S., 657, 684, the court said: "The case, in this regard, is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligation of con-

tracts, in which, if the highest court of a State decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the State court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is."

And in the case of *Railroad Co.* v. *Tennessee*, 153 U. S., 486, 495, where this court took jurisdiction, Mr. Justice Jackson cited and relied on these cases and said that the court had jurisdiction because the constitutionality of certain statutes passed since the Constitution of the State of Tennessee was adopted (1834) were drawn in question.

And so Mr. Justice Peckham, in *Bacon* v. *Texas*, 163 U. S., 205, 216, asserts that this question is now finally settled. He said:

"Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a State court *by some subsequent statute of the State which has been upheld or effect given it by the State court. Lehigh Water Co.* v. *Easton*, 121 U. S., 388; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S., 18; *Central Land Co.* v. *Laidley*, 159 U. S., 103, 109. * * * *If the judgment of the State court gives no effect to the subsequent law of the State, and the State court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract.* The above cited cases announce this principle."

And further on Mr. Justice Peckham seems to go even further in limiting the ground of jurisdiction where he says:

"The case is not altered by the fact that the State has passed an act which the defendant asserts impairs the obligation of their contract, so long as the court, in deciding their case, holds that they never had a contract because they never had complied with the provisions of the original statute, and so long as it gives judgment wholly without reference to the subsequent act, and without upholding or in any manner giving effect to any provision thereof." Page 219.

These apt citations would seem to make clear our contention.

But it is argued, and many times reiterated, with more ingenuity than soundness, that the decision of the Supreme Court of Appeals "validates these laws which you have declared are unconstitutional," (page 9 of second brief for appellant,) that is, that it makes valid the act of March 7th, 1872, (forbidding reception of coupons for taxes) which was declared unconstitutional and void in *Antoni* v. *Wright*, 22 Gratt., 833, approved in *Hartman* v. *Greenhow*, 102 U. S., 672.

We submit that this is not true, (1) because, if the decision in the case at bar was right (that there was no contract), then no act to forbid reception of coupons was necessary—there being no law to authorize it, a statute forbidding it would be *brutem fulmen*, (2) even though ordinarily that would be the effect, yet it is not so here, because the act of March 7th, 1872, was repealed in 1887 by section 4202 of the Code of 1887, which provides:

"Sec. 4202. WHEN THIS CODE TO GO INTO EFFECT, AND ALL ACTS OF A GENERAL NATURE BE REPEALED.—All the provisions of the preceding chapters shall be in force upon and after the first day of May, eighteen hundred and eighty-eight; and all acts and parts of acts of a general nature, in force at the time of the adoption of this code, shall be repealed from and after the said first day of May, eighteen hundred and eighty-eight, with such limitations and exceptions as are hereinbefore or hereinafter expressed."

The astute counsel, doubtless in anticipation of this last answer, contends that section 399, found in the Code of 1887, is a substitute for the act of March 7th, 1872, but in this, he is clearly mistaken. That section must be read in connection with the succeeding sections of the chapter, for they are *in pari materia*. This is too elementary a proposition to require citation of authorities. These sections are the Code's substitutes for the act of January 14th, 1882, which were brought under review in this court in *Antoni* v. *Greenhow*, 107 U. S., 669, and there, though assaulted by the coupon holders, expressly declared valid.

For the convenient comparison and examination by the court, we beg to incorporate herein these sections:

"Sec. 399. GOLD, SILVER OR BANK NOTES, ONLY, TO BE RECEIVED FOR TAXES; OFFICER NOT TO CONVERT MONEY INTO COUPONS.—It shall not be lawful for any officer charged with the collection of taxes, debts, or other demands of the State, to receive in payment thereof anything else than gold or silver coin, United States treasury notes or national bank notes; or to convert any moneys received by him into coupons, either directly or indirectly, by purchase, exchange or otherwise; but he shall account to the treasury of the State in money, or by check or draft, for all taxes, debts, or other demands of the State, received by him in money; nor shall it be lawful for such officer to purchase coupons for the purpose of the sale thereof, or to sell the same during his continuance in office.

"Sec. 400. OFFICER TO KEEP BOOKS SHOWING AMOUNTS RECEIVED IN COUPONS, AND FROM WHOM.—Every such officer shall preserve upon the books of his office a statement showing the amounts received by him in coupons, and the parties from whom received, which shall be open to the inspection of any one desiring to examine the same, and he shall accompany any settlement made by him with a sworn statement of the aggregate amount collected by him in coupons.

* * * * * * * * * * *

"Sec. 406. TAX-COLLECTOR TO RECEIVE COUPONS FOR INDENTIFICATION AND VERIFICATION.—Whenever any tax-payer, or his agent, shall tender to any person whose duty it is to receive or collect taxes, debts, or other demands due the State, any papers or instruments printed, written or engraved, purporting to be coupons detached from bonds issued under the act entitled "An act to provide for the funding and payment of the public debt," approved March thirtieth, eighteen hundred and seventy-one, or from bonds issued under the act entitled "An act to provide a plan of settlement of the public debt," approved March 28th, eighteen hundred and seventy-nine, in payment of any such taxes, debts, or demands, the person to whom such papers are tendered, shall receive the same and give the party making the tender a receipt, stating that he has received them for the purpose of indentication and verification."

The tax collector understood that section 399 was to be read in connection with the other sections of the chapter, for we find him not refusing the coupons, but actually receiving them "in payment of State real-estate tax for the year 1891." (See his receipt on page 9 of record.) This prohibition, then, of the statute, had reference to tenderers of coupons, who refused to submit themselves to the conditions prescribed in the succeeding sections, which conditions, be it remembered, this court had declared reasonable and just (*Antoni* v. *Greenhow*, *supra*), and to which conditions the plaintiff in error submitted, and against which he cannot be heard to complain.

The suggestion made in the brief (we can hardly look upon it as a definite proposition), that this court will take jurisdiction, because the Supreme Court of Appeals, by its determination, refused to give effect to the former judgments of this court, cannot be sustained. By an examination of the cases cited by the learned counsel, it will be seen that, in order to effectuate the condition necessary to give the jurisdiction in this class of cases, there must be a

refusal to recognize a judgment in some subsequent proceedings between the same parties or their privies, not the refusal to the court of the State to follow as a precedent some decision rendered between other parties.

For these reasons, we submit that this court should dismiss the appeal.

On the Merits of the Case.

The ground upon which the Commonwealth, in the Supreme Court of Appeals, fought and won this, to her, one of the most important legal controversies in her history, was that, it having been judicially determined by her highest court, and by this honorable court, that the coupon contract to receive coupons after maturity "for all taxes, debts, dues and demands due the Commonwealth," was, in part at least, void (as to school taxes, fines and liquor licenses), as a consequence, rendered the whole void, by virtue of that universally accepted principle of the law of contracts, that an illegal element, or the vice of illegality, entering into or constituting a part of an entire contract, renders the whole contract absolutely illegal and void.

In *Antoni* v. *Wright*, 22 Gratt., 833, the question presented was whether an act of the General Assembly of Virginia prohibiting the collecting officers of the Commonwealth from receiving coupons in payment of the dues to the State had the effect of impairing the contract expressed on the face of the coupon authorized by the Funding Act of March 30, 1891, in the following language:

"*The coupons shall be payable semi-annually, and be receivable at and after maturity for all taxes, debts, dues and demands due the State, which shall be so expressed on their face.*" Acts of General Assembly 1870-1, p. 378-9.

The act that sought to render this provision of the Funding Act nugatory was as follows:

"An act declaring what shall be received in payment of taxes or other demands of the State. In force March 7, 1872.

1. Be it enacted by the General Assembly of Virginia, that hereafter it shall not be lawful for the officers charged with the collection of taxes or other demands of the State, due now or that shall hereafter become due, to receive in payment thereof anything else than gold or silver coin, United States treasury notes or notes of the National banks of the United States.

2. All acts or parts of acts inconsistent with this act are hereby repealed.

3. This act shall be in force from and after its passage." Acts of General Assembly 1871–2, page 141.

In that case (*Antoni* v. *Wright*), four of the five judges of the court sat, and three concurred in the holding that this latter act was unconstitutional and void, because it impaired the coupon contract. (This was the minimum number of judges under the State Constitution required in order to declare any law null and void by reason of its repugnance to the Federal Constitution or the Constitution of the State. Sec. 2, Article VI of Virginia Constitution.

But back of this question another necessarily had to be first settled and that was *whether the Legislature had the constitutional right to make the coupon contract.*

In order to justify their position, the counsel for the coupon-holders, as well as the judges who concurred in their view, had necessarily combatted the contention that Section 8 of Article VIII of the State Constitution (heretofore quoted) dedicated any part of the State revenues to the support of public free schools, and it was admitted, certainly it was never denied, that could it be shown that the Legislature did not have the constitutional right, by reason of said provision, to allow funds so set apart to be absorbed by the reception of coupons, then the tax-receivable feature of the coupon could not be enforced. And as it is a matter of no little importance in this discussion, as well as to have the argument connected, we beg, even at the expense of repeating much that is incorporated in the first brief of the late distinguished Attorney General Scott,

kindly taken from, and credited to a brief submitted to the Supreme Court of Appeals by the author of this brief, (he not being then counsel in the case here) to make somewhat full quotations from the decisions of the Supreme Court of Appeals and of this court, from which this will clearly appear.

Judge Bouldin, who delivered the opinion of the court in *Antoni* v. *Wright, supra,* at page 836–37, states the question at issue, as follows:

"1. Was there under the act aforesaid of March 30, 1871, a valid contract between the State and such of her creditors as accepted and complied with the terms of the act that interest coupons issued thereunder should 'be receivable at and after maturity for all taxes, debts, dues and demands due the State.' * * * *

"The first and all-essential question is, was there a valid contract between the State and her bondholders?"

And at page 854 he squarely meets the question of the effect of the constitutional obligation resting on the Legislature to keep inviolate the fund dedicated to free school purposes, and thus disposes of it:

"And we are of opinion, in the absence of other objections, that the power of the Legislature to make the contract under consideration is unquestionable.

"But conceding that proposition, it is argued that the contract in this case is void, because it is repugnant to the eighth section of the eighth article, and the third section of the tenth article of the State Constitution, dedicating certain portions of the State revenue to the support of free schools.

* * * * * * *

"The obligation to provide for the interest due by these coupons is as high as the duty of applying the capitation tax and other funds to the schools. Both duties are alike obligatory, and both may be discharged, as there is no conflict between them. It is only a failure to discharge the one that the performance of the other can be put in jeopardy,

and it rests with the Legislature, by faithfully and fearlessly meeting both obligations to preserve the plighted faith of the State, and to protect her Constitution from violation."

And Judge Anderson, who delivered the opinion of the court in the same case (*Antoni* v. *Wright*), on a rehearing, at page 874, says:

"But it is argued that the Legislature had no power under the Constitution to authorize a contract to be made binding the State to receive the interest coupons when due in payment of taxes, &c., upon the ground, First, that it is incompatible with other obligations imposed upon the Legislature by the Constitution of the State. And in support thereof it is said those provisions of the Constitution which set apart certain funds and a certain proportion of the tax for the public schools would be defeated by this legislation. It would seem to be a sufficient reply to say if it were impracticable to raise a sufficient revenue for both purposes, the latter did not impose an obligation on the Legislature paramount to the obligation to provide for the payment of the interest on the public debt. That was an obligation antecedent and paramount to the Constitution itself, and could not be repudiated by the Constitution if it had so provided. But it is not repudiated nor ignored, but the obligation is clearly recognized by sections 7, 8, 19 and 20 of article 10, at least to pay Virginia's proportion. And, furthermore, this being an obligation of debt, and not eleemosynary in its character, as are the other provisions referred to, however desirable and important it may be that they should be carried out, I hesitate not to say this is of higher obligation. A man must be just before he can be generous.

"But there need be no clashing of duties here. It is only required that the Legislature should levy a tax sufficient for both objects—a duty imposed on it by Constitution. It has not been the practice to set apart in the public treasury the identical money received for the public

schools; nor is it required by the Constitution or Act of Assembly. And the Legislature has discharged its constitutional obligation when it has set apart the required amount for that purpose."

The reasoning of the court in *Antoni* v. *Wright* logically and inevitably led to the decision in the case of *Clarke* v. *Tyler, Sergeant*, 30 Grat., 134, in which it was held that *fines*, though expressly dedicated by the Constitution to free school purposes, might be paid in *coupons*, and Judge Christian who delivered the opinion of the court, boldly asserted that the contract on the face of the *coupons* was broad enough to embrace *fines* as well as other dues. He said: "The Legislature has used words which by their explicit, comprehensible and unmistakable meaning embrace fines as well as taxes and debts. If, after using the words, 'dues and demands,' they had intended to exclude fines, how easy it would have been to have added the words, 'except fines' after the words 'dues and demands,' But having used these broad and comprehensive terms, which by their common and explicit meaning embrace fines, and having used no words of exception, it follows upon every rule of construction that fines are embraced in the terms 'dues and demands."

He then proceeded to reiterate the argument made in *Antoni* v. *Wright*, that the Legislature was under greater legal and moral obligation to keep this coupon-contract than to keep inviolate the free school fund. He said: "No State, in order to educate its citizens, ought to withhold from its just creditors that which has been pledged by its honor and plighted faith to the payment of its just debts."

And Judge Anderson, in the same case, in an elaborate opinion, concurring in the opinion of the court, at p. 164, said: "In our complex form of government, as we have seen, the courts are bound to have respect to and take cognizance of, the Federal as well as the State Constitution; in fact, to regard the former as the supreme law,

which invalidates—renders null and void—any law of the State which impairs the obligation of contracts. Now, it is claimed in argument that the State Constitution inposes an equal, if not higher, obligation on the State to carry out the provisions for the schools. In my opinion it cannot be so regarded, neither in morals nor in law. * * * And the reason is because the obligation in the former case is not a contract within the meaning of the 10th Section of Article I. of the Federal Constitution. Consequently, if the revenues which have been set apart for the schools are necessary in fulfilment of the contracts of the Commonwealth, to be applied to the payment of the interest on the public debt, so to apply them is not prohibited by the Constitution of the United States; whilst to set apart by the State Constitution, or by an act of the Legislature, a portion of the revenues of the State for schools, or as a literary fund, which are necessary to enable the Commonwealth to fulfil her obligations of contract, and without which it would be impracticable for her to fulfil them, would be a plain violation of the Federal Constitution, because it would be a law of the State, which impairs the obligation of contract."

Judge Staples, who delivered a dissenting opinion in this same case, at pp. 148–'49, thus states the drift and effect of the decisions of the court on this all important question: "It is very true that fines have heretofore been paid into the treasury indiscriminately, with other public dues, and so long as the whole was paid in money no injustice or inconvenience could arise. But now the question is presented in an entirely different aspect. For if the Legislature shall pass a law, as it long ago ought to have done, carrying out this provision of the Constitution, and setting apart the fines for the school purposes, under the present ruling of the court, IT MUST BE HELD UNCONSTITUTIONAL, BECAUSE THE FUNDING BILL AUTHORIZES THE PAYMENT OF STATE DUES IN COUPONS, AND THUS IT IS THAT AN UNCONSTITUTIONAL CONTRACT IS MADE PARAMOUNT TO THE CONSTITUTION."

The small caps are ours, and they are intended to emphasize the opinion of this able and fearless judge as to the logical and inevitable effect of the decisions previous to *Greenhow*, v. *Vashon*.

Again, this learned judge (Staples) says, at page 147: "I agree that the funding act is broad enough to include fines imposed for the violation of penal laws, and upon that ground, I thought, and still think, violates the seventh section of the eighth article of the Constitution of Virginia."

This same judge, in one of the ablest opinion ever delivered by him, thus speaks:

"My objection is not based upon any idea that a specific sum is set apart in the public treasury in particular coin and notes for common schools which may not be touched; but that the Legislature cannot constitutionally provide that the school tax shall be paid in any other other medium than money, or its equivalent. And for the obvious reason that a fund is to be raised from the particular source designated to be applied to the establishment of public free schools for the benefit of all the people of the State. These objects are effectually defeated by the funding act."

And he thus concluded his argument: "These are some of my objections to the funding bill as affected by the Constitution of Virginia. It can hardly be necessary to adduce argument or authority to show that no valid contract can be founded on a law which violates the Constitution of a State. No binding obligations can result from such a law. It confers no legal right on the one party and imposes no corresponding legal duty on the other."

Antoni v. *Wright*, 22 Grat., 862–'63.

The consideration of the question of the binding effect of the coupon contract was never gone into by this court, to any appreciable extent, but, as before stated, it was taken as a concluded one by the decisions of the Supreme Court of Appeals. Mr. Justice Field, in *Hartman* v. *Greenhow*, 107 U. S., 672, 681, referring to *Antoni* v.

Wright, supra, said: "Its validity, as might have been expected, was soon attacked in the courts as impairing the obligation of the contract contained in the Funding Act, and came before the Supreme Court of Appeals of the State for consideration in *Antoni* v. *Wright*, at its November term, 1872. The subject was there most elaborately and learnedly treated. The cases above were cited by the court; and the provision of the Funding Act was shown, by reasoning perfectly conclusive, to be a contract founded upon valuable considerations and binding upon the State. It was earnestly pressed upon the court that it was not within the legitimate power of the legislature to make such a contract; that it would tend to embarass the action of subsequent legislatures by depriving them of the control of the annual revenue, and might, by absorbing the revenue, substantially annul the taxing power and put a stop to the wheels of government. But the court said, among other answers to this, that no rightful power of the State was surrendered by the legislation, but simply a provision made for the payment of the debts of the State; that the annual accruing interest on the debt of the State was in all well regulated governments deemed an essential part of their annual expenses, and was always annually provided for."

In the year 1884, the Legislature, obedient to the mandate of the Constitution, inserted in the statute providing for the assessment and collection of taxes the following provision:

"113. All taxes assessed on property, real or personal, by this act and by it dedicated to the maintenance of the public free schools of the State, shall be paid and collected only in lawful money of the United States, and shall be paid into the treasury to the credit of the free school fund, and shall be used for no other purpose whatever. And to this end the Auditor of Public Accounts shall have the books of the commissioners of the revenue prepared with reference to the separate assessment and collection of said

school tax, and the several treasurers of the Commonwealth shall have the tax bills in their counties or corporations so made out as to specify the amount of tax due from each tax-payer to the said public free school fund, including the capitation tax and school taxes of whatever kind or nature, and to keep said capitation tax and school taxes separate and distinct from all other taxes or revenues so collected by him, and forward the same, thus separate and distinct, to the Auditor of Public Accounts, which shall be kept separate and distinct by him from all other taxes or revenues, until paid to the public free schools." (Acts 1883–'84, p. 603.)

This act came under review in *Greenhow, Treasurer*, v. *Vashon*, 81 Va. 336, and was held valid and constitutional in an able and exhaustive opinion. That the opposing contention was that *Antoni* v. *Wright*, and especially *Clarke* v. *Tyler*, 30. Grat. 134; and *Williamson* v. *Massey, Auditor*, 33 Grat. 237, had concluded the question otherwise. This case (*Greenhow, Treasurer*, v. *Vashon*,) was appealed with the greatest confidence to the Supreme Court of the United States, but this court, to the great consternation of the coupon-holders, held the decision of that court to be correct.

The court, speaking by Mr. Justice Bradley, said:

"We think that the position of the Court of Appeals in this case is well taken, that coupons could not be made receivable as a portion of the literary fund; and that, if they could not be received as a part of the fund, they could not properly be made receivable for the taxes laid for the purpose of maintaining said fund. For several years after the Constitution was adopted, and after the law of 1871 had been passed, the taxes for the benefit of free schools were mingled in the assessment and collection of taxes, and in the treasury when received, with the other taxes and funds raised for the support of the State government. As long as this state of things continued the collecting officers could not object to receiving coupons in payment of taxes,

because the share due to the school fund could easily be paid from the treasury, to the credit of that fund, out of the lawful moneys received. But by the tax act of March 15, 1884, it was provided that all taxes assessed on property, real or personal, by that act, and dedicated by it to the maintenance of the public free schools of the State, should be paid and collected only in the lawful money of the United States, and should be paid into the treasury to the credit of the free school fund, and should be used for no other purpose whatsoever, and to this end the Auditor of Public Accounts should have the books of the Commissioner of the Revenue prepared with reference to the separate assessment and collection of said school tax, and the several treasurers of the Commonwealth should have the tax bills in their counties and corporations so made out as to specifiy the amount of the tax due from each tax-payer to the public free school fund, including the capitation taxes of whatever kind or nature, and should keep said capitation tax and school tax separate and distinct, from all other taxes or revenues so collected by him, and forward the same, thus separate and distinct, to the Auditor of Public Accounts, which should be kept separate and distinct by him from all other taxes or revenues until paid to the public free schools. Since the passage of this act, and in pursuance thereof, the taxes and other revenues raised for the purpose of maintaining public schools, and belonging, under the Constitution, to the literary fund, have been kept separate and distinct from the other taxes raised for the general support of the State government. This was the practice when case of *Vashon* v. *Greenhow* arose, and in our judgment the law requiring the school tax to be paid in lawful money of the United States was a valid law, notwithstanding the provision of the act of 1871; and that it was sustained by the sections of the Constitution referred to, which antedate the law of 1871, and override any provisions therein which are repugnant thereunto." *Vashon* v. *Greenhow*, 135 U. S., 713, 717.

It cannot be denied that this decision, coupled with the decision in *Hucless* v. *Childrey*, 135 U. S., 709, which went along with it (holding that coupons could not be tendered for, or used to pay the liquor-license tax) overruled *in toto*, *Clarke* v. *Tyler*, and *Williamson* v. *Massey*, and, in its practical effect, materially modified the holding of the Supreme Court of Appeals in *Antoni* v. *Wright*, and of this court in *Hartman* v. *Greenhow* and *Antoni* v. *Greenhow*, for it divorced from the coupon contract more than one-third of the State's revenues, made up as shown by the official reports of the Auditor of Public Accounts, as follows:

Capitation tax and one-fourth tax on real and personal property for the year 1885	$654,794
Fines and forfeitures collected for that year	20,120
Total revenues dedicated to public free school purposes	$674,914
To which add tax of liquor licenses for 1885	318,629
Annual revenues held not subject to coupon contract	$993,543

This surely cannot be said to a matter *de minimis*' for more than one-third of the total annual revenues ($2,696,103), was put beyond the control of the coupon-holders and made available for public education.

It is to be borne in mind that in *Greenhow* v. *Vashon*, neither in this court, nor in the Supreme Court of Appeals, was the question raised or determined as to the effect of holding the coupon contract illegal in part. If any expression of the court on this question was made, it must be held mere *dicta*, and not binding.

This is now the question presented and to be determined.

The able judge (Richardson), who delivered the opinion of the Supreme Court of Appeals in the case at bar, thus introduces a discussion of this important question:

"Now, we feel entirely safe in laying it down as an indisputable fact that it has been solemnly adjudged by the highest court in the land that the coupon feature of the act of 1871, so far as its validity was passed upon in *Hucless* v. *Childrey* and in *Vashon* v. *Greenhow*, was unconstitutional and void. The same is true of the act of 1879, because the same vice enters into and invalidates them both.

"Such being an undeniable postulate, the next, and very material question that arises is, what is *the effect* of the vice of illegality and consequent unconstitutionality as to part of an entire contract, whether by statute or otherwise; that is, as respects an entire contract, incapable of being apportioned? In other words, it is not a universally accepted principle of the law of contracts that an illegal element, or the vice of illegality, entering into or constituting part of the promise, or consideration, of an *entire contract*, renders the whole contract absolutely illegal and void. This question, upon principle and authority, can receive none other than an affirmative answer. No impartial mind can for a moment hesitate to pronounce the coupon contract an entirety and incapable of separation into parts, or of being construed as illegal and invalid as to part, and yet legal and valid as to the residue, for the simple legal reason that the bargain is one, the consideration is one, and the covenant is one, and the vice of illegality, in part, inhering in the coupon contract from its inception, the whole is void.

"The coupon contract, as expressed on the face of each coupon, is that the coupons *shall* be receivable after maturity for *all* taxes, debts, dues and demands due, &c.; and when any tax, of whatever character, is by judicial determination, or otherwise, exempted from the operation of the very terms of that contract, it can be for no other reason than that the contract is tainted with illegality, and is, therefore, wholly void; and such is necessarily the effect of the decisions of the Supreme Court in *Hucless* v.

Childrey and in *Vashon* v. *Greenhow*, *supra*." *Commonwealth* v. *McCullough*, 89 Va., 597, 613.

We beg to repeat here some of the leading authorities relied on in the Supreme Court of Appeals to sustain the contention that the coupon contract was entire and wholly void.

It is an elementary principle, so familiar that it need only be stated, that a contract illegal in part is incapable of being enforced, for *ex turpi contractu non oritur actio*. (Chitty on Contracts, *657.) This author says:

"A distinction has been taken in the books between a deed or condition void in part by statute and a case of such an instrument being in part void at common law. 'A statute,' it has been said, 'is like a tyrant—where he comes he makes all void; but the common law is like a nursing father—it makes only void that part where the fault is, and preserves the rest.' And it has been laid down that if a part of a deed or condition be contrary to a statute, the remainder (even, it seems to have been considered, though it be distinct) shall also be void. But this distinction cannot be supported; and a contract is void IN TOTO, if a part of it be illegal either by virtue of statute or at comman law." *Idem*, *693.

The general doctrine is that if the promise and the consideration are each entire, and the consideration is, even in part, illegal, the contract is void. (2 Addison on Contracts, Note 1, *1169.)

The case of *Hanner* v. *Doane*, 12 Wall., 342, determines that a promissory note, the consideration of which is wholly or in part the price of goods illegally sold, is void, and an action cannot be sustained thereon. A most lucid discussion of this subject will be found in *Thomas* v. *City of Richmond*, 12 Wall., 349, where Mr. Justice Bradley, delivering a unanimous opinion, not only held that notes issued by a municipal corporation, contrary to law, were void, but that money received therefor by the corporation could not be recovered back.

In the case of *Hinman* v. *Woodruff*, 11 Vt., 592, Judge Redfield said for the court: "But it is fully settled that, when any portion of the entire consideration of a contract is against law, the whole contract is illegal, and cannot be enforced. If part of the consideration of a bill of exchange be the sale of spirtuous liquors contrary to law, though the other part be money lent, the entire contract is void, and no other part of it can be enforced. (*Scott* v. *Gilman*, 3, Taunt. R., 266; *Frotherstone* v. *Hutchinson*, Cro. Eliz., 199; *Crawford* v. *Morell*, 8 Johns. 253.) The courts have not been able to perceive any ground upon which the plaintiff can be permitted to recover upon this note, even to the amount of what was justly due him. This is but reasonable punishment for including in his just dues that which he had no right to take."

In the case of *Filson's Trustee* v. *Himes*, 5 Pa. St., 452, Chief-Justice Gibson concludes an able opinion in this language: "But in those cases distinct bargains were put in the same note; in this the bargain is one, the consideration is one, and the covenant is one, and all is void."

The case of *Kennett* v. *Chambers*, 14 Howard (U. S. R.), 39, decides that "no contract can be enforced in the courts, no matter where made or where to be executed, if it is in violation of the laws of the United States, or is in contravention of the public policy of the Government, etc."

Marshall, C. J., speaking for the Supreme Court of the United States in the case of *Craig* v. *State of Missouri*, 4 Peters, at page 436, said: "The certificates for which this note was given being in truth 'bills of credit,' in the sense of the Constitution, we are brought to the inquiry:

"Is the note valid of which they form the consideration?

"It has been long settled that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned that an act forbidden by the Constitution of the United States, which is the supreme law,

is against law. * * * The consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration is the act of emitting bills of credit, in the mode prescribed by the law of Missouri, which act is prohibited by the Constitution of the United States. * * * A majority of the court feels constrained to say that the consideration on which the note in this case was given is against law of the land, and that the note itself is utterly void."

In the case of *Thayer* v. *Rock*, 13 Wend., 53, a contract had been made as well for the sale of real as of personal property, which was entire, founded upon one and the same consideration, and the same not being reduced to writing, it was held that it was void, as well as in respect to the personal as the real property. Chief-Justice Savage saying: "The action in this case was brought to enforce that part of the contract which, if it had stood alone, would have been good, but being a part of an entire contract, embracing another subject, in respect to which it was void, the whole was void. The contract was to sell the mill-site and privileges, and also the wood and timber, and was an entire contract, entered into for one and the same consideration; the two subjects cannot be separated, and, being void in part, is totally void."

And the Chief Justice illustrates the principle of the decision in this manner: "So of the case put by counsel in argument. 'A sells to B an acre of land and a pair of horses for $500, all by one entire parol contract; the horses are delivered and the money paid. The counsel says the title to the horses passes. Not so, I apprehend, for the contract as to the land being void, the whole is void. A may reclaim his horses or their value, and B may recover back his $500."

In the case of *DeBeerski* v. *Paige*, 36 N. Y. R., 537, Davies, C. J., said: "It is well settled if part of one entire contract be void under the statute of frauds, the whole is void; that the party shall not be permitted to separate the parts of an entire agreement and recover on one part,

the other being void. (*Chater* v. *Becket*, 7 Turn., 197. *Crawford* v. *Murrell*, 8 John., 253.)

As said by Mr. Justice Story in *United States* v. *Bradley*, 10 Peters, 343, where may be found a good discussion of this question, it is well settled that in all cases where the different covenants or conditions are several, and independent of each other, and do not import *malum in se*, those that are legal may be enforced, but not otherwise.

"When a note is given in payment of an account, some of the items of which are legal and some illegal, although an action would lie for so much of the account as is made up of lawful items, the note itself is entirely void. That the plaintiff cannot recover on the note to the extent of the lawful items, although they are distinctly severable from the unlawful."

3 Am. and Eng. En. of Law, p. 887, Note 2.

In *Widoe* v. *Webb*, it was held: "The concurrent doctrine of the text-books on the law of contracts is, that if one of two considerations of a promise be VOID merely, the other will support the promise; but that if one of two considerations be UNLAWFUL the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected, and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts, part of which are unlawful; because the WHOLE CONSIDERATION is the basis of the WHOLE PROMISE. The parts are inseparable. (Metcalf on Contracts, 246; Addison on Contracts, 905; Chitty on Contracts, 730; 1 Parsons on Contracts, 456; 1 Parsons on Notes and Bills, 217; Story on Prom. Notes, § 190; Byles on Bills, 111; Chitty on Bills, 94).

"Whilst a partial WANT OR FAILURE of consideration

avoids a bill or note only *pro tanto*, ILLEGALITY in respect to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire and cannot be apportioned; and it has been said, with much force, that where parties have woven a web of fraud or wrong, it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound. (Story on Prom. Notes and Byles on Bills, *Supra*). And, in general, it makes no difference as to the effect, whether the illegality be at common law or by statute."

20 Ohio St., 431.

The case of *Noyes' Executrix* v. *Humphreys*, 11 Grat., 636, was as follows: "N rents property from T, who undertakes to have certain improvements put up thereon, and he contracts with H to execute the work. H proceeds and does a part of the work and receives some payments from T; but finding that T is embarrassed, he stops the work, and declares that he will proceed no further with it. N then tells H to go on and finish the work and he will pay him. H then goes on and does the work; and after it is done, settles with T, and takes his bond for the balance due him. T being unable to pay him, H sues N for the whole balance due him for the work. It was held: "That the promise alleged in the declaration being an entire promise to pay as well for that done before as for that done after the promise, even if the promise would have been valid as to the work to be done, it was collateral as to that which had been executed, and being an entire promise, it is void as to the whole."

The then President of this court (Allen), at page 653, said: "The debt had been incurred, and though there may have been a sufficient consideration of benefit to the landlord in avoiding the loss of rents and the injury resulting from leaving the work in an unfinished state to have supported a promise to pay for the liability of Thomp-

son, the promise would have been collateral, though on a good consideration, and must be in writing to be valid. But where the verbal promise is entire, and part of it relates to a matter which renders it necessary under the statute that the promise should be in writing, the whole promise is void. Being entire and part of it void, the whole is defective."

This is, indeed, pertinent language. Here the undertaking of the contract, expressed on the face of the coupon, was that it should "be receivable at and after maturity for all taxes, debts, dues and demands due the State," and this court and the Supreme Court of Appeals had solemnly determined that "the Legislature had no power to declare, or contract, that moneys due to the literary fund might be paid in coupons attached to the bonds authorized by the act of 1871."

(*Vashon* v. *Greenhow*, 135 U. S. R., 719.)

It should be borne in mind that it is not contended that the State does not owe the interest represented by the coupon, or that it is not under moral and legal obligation to pay such interest, but only that the contract to accept the coupon for "all taxes, debts, dues and demands" to the State, is void. The court is not asked to do so, nor could the court legally absolve the State from her duty to pay the principal and interest called for by the bonds issued under the act of 1871, (so far as the same now remains unfunded) according to the terms of the contract contained in the bond. *The vice extended only to the tax-receivable feature of the contract.* But it completely permeated and vitiated that feature.

The other distinct engagements by which the State had bound herself in the bond were legal, and can be enforced, as any other contract made by her. Thus the principle contended for, that where there are contained in the same instrument distinct engagements, by which a party binds himself to do certain acts, some of which are legal and some illegal, the performance of those which are legal may

be enforced, through the performance of those which are illegal cannot, has its full recognition.

The learned Judge (Richardson) in this case, speaking for four of the five judges of the Supreme Court of Appeals, concludes his argument in the language following:

"Inasmuch, therefore, as the coupon feature of the Funding Act of 1871, which is simply an incident of the main purpose of the act, and readily separable therefrom, and inasmuch as said coupon feature constituted a contract which is undeniably an entire contract and incapable of being separated into parts, and inasmuch as it has been declared by the highest court in the land that that contract is tainted in part with the vice of illegality, it necessarily follows that, in the light of the authorities cited above, the whole coupon contract, or covenant, is absolutely illegal and void. This, it seems to us, is clearly and necessarily the effect of the decisions of the Supreme Court of the United States in the cases of *Hucless* v. *Childrey* and *Vashon* v. *Greenhow*, *supra*.

"The Legislature undertook to make the coupons receivable for *all taxes*, &c. But the Supreme Court, in *Vashon* v. *Greenhow*, says this legislature had no power to do this. Why not? Simply because it was directly opposed to the aforesaid provisions of the State Constitution with respect to the maintenance and support of the public free schools, and was, therefore, illegal and void. It cannot be pretended for a moment that the sacredness of the school fund depended upon the legislative act setting it apart as required by the State Constitution. The Supreme Court did not so decide, but, going back to the inception of the coupon contract, the illegal act of the legislature declared that the legislature was without power and authority to do the act in question."

And again, at page 619, in concluding the opinion, he makes the following observations:

"In concluding his opinion in *Vashon* v. *Greenhow*, Mr. Justice Bradley remarked: 'It is certainly to be

wished that some arrangement may be adopted which will be satisfactory to all the parties concerned, and relieve the courts as well as the Commonwealth of Virginia, whose name and history recall so many interesting associations, from all further exhibitions of a controversy that has become a vexation and a regret.' This remark is worthy alike of the man and the judge. The generous wish has been accomplished, except as to the little squad of coupon-holders who continue to vex the Commonwealth; and, whatever may be said to the contrary, the recent settlement of the State debt is due exclusively to the influence of the decisions of the Supreme Court in *Hucless* v. *Childrey* and *Vashon* v, *Greenhow, supra.* In view of those decisions, and being entirely satisfied that the coupon feature of the act of 1871, which is distinct and separate from the main feature of the act, is tainted with the vice of illegality, which renders the whole coupon contract illegal and void, we take, in view of said Supreme Court decisions, the one additional and necessary step, and declare the whole coupon contract absolutely illegal and void."

We thus have embalmed, in the judicial decisions of the court, the historical fact, that after all the heat, losses and embarrassments engendered, by probably the most prolonged, acrimonious, varied and vexatious litigation that has ever engaged the attention of the courts of this continent, the honor of the Commonwealth has been preserved by her accepting a scheme of settlement proposed by the creditors themselves. This also is fully set forth in the preamble of the act approved February 20th, 1882, providing for said settlement in the following language:

"Whereas by a joint resolution of the General Assembly of the State of Virginia, adopted on the third day of March, eighteen hundred and ninety, a commission was appointed on the part of Virginia to receive propositions for funding the debt of the State, not funded under the

act known as the "Riddleberger bill," approved February fourteenth, eighteen hundred and eighty-two, from a properly constituted representative of her creditors; and

Whereas said Virginia debt commission has submitted a report to the General Assembly, wherein it appears that under a certain agreement, dated May twelfth, eighteen hundred and ninety, lodged with the Central Trust Company of New York, Frederick P. Olcott, William L. Bull, Henry Budge, Charles D. Dickey, junior, Hugh R. Garden, and John Gill, constituting a committee for certain of the creditors of Virginia, called the "Bondholders' committee," have proposed to said commission to surrender to the State in bulk, not less than twenty-three million of dollars of the public debt, unfunded under said act, approved February fourteen, eighteen hundred and eighty-two, in exchange for an issue of new bonds, as hereinafter specified, the same to be apportioned between the several classes of creditors by a tribunal which the said creditors have themselves appointed; and that, in pursuance of said proposal, an agreement has been entered into unanimously between the said commission and the said bondholders' committee, subject to approval by the General Assembly," etc. Acts General Assembly, 1891–2, page 533.

The serenity, however, of the situation, is disturbed by "the little squad of coupon-holders, who continue to vex the Commonwealth," representing less than one hundred and fifty thousand dollars of the principal of the debt, and less than five hundred thousand dollars of clipped coupons, one of whom is here appealing to this honorable court to reward his obstinate resistance of a settlement which fully measures up to what Mr. Justice Bradley said, in closing the last opinion of this court on this subject, should be its characteristics.

The State, we verily believe, stands ready to allow the holders of this small fragment of her enormous debt to come into the late settlement, which is now conceded to be

no less just to creditors than honorable to her, but she feels that her interest, as well as that of her other creditors, require that this vexatious litigation should cease, and that forever. She, therefore, invokes the protection of that maxim so salutary in the administration of justice, *interest rei publicea ut sit finis litium.*

HENRY R. POLLARD.

January 1st, 1898.